No. 86-23

Supreme Court, U.S.
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IN THE SUPREME COURT OF
THE UNITED STATES

_____Term, 198__

BARBARA J. GARVIN and JAMES EDWARD GARVIN, JR.,

Petitioners,

v.

ALUMAX OF SOUTH CAROLINA, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does §905(a) of the Longshoremen's and Harbor Workers' Act, as amended, which allows third party actions against general contractors, apply to a longshoreman's action at law resutling from an injury occurring on a pier over navigable waters of the United States or is said section applicable only when the third party tort suit arises under the admiralty jurisdiction of the United States?

2. Does state or federal law govern the rights of a longshoreman injured on a pier over the navigable waters of the United States?

PARTIES

Petitioners Barbara J. Garvin and James Edward Garvin, Jr., were the Plaintiffs in the District Court and the Appellees in the Court of Appeals. Alumax of South Carolina, Inc., was the only other party to the appeal, the resulting

decision of which your Petitioners request review.

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REPORTS OF OPINIONS

The Order of the District Court has not been reported. The Opinion of the Court of Appeals is reported at 787 F.2d 910 (4th Cir. 1986).

JURISDICTION

The Opinion of the Court of Appeals was decided and entered on April 1, 1986. A Petition for Rehearing and suggestion for Rehearing in banc was denied and entered on May 14, 1986. Jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article VI, Clause 2, Constitution of the United States provides:

CLAUSE 2. SUPREME LAW

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

33 U.S.C.A. §901, et seq., as amended, provides in part as follows:

§902. DEFINITIONS

> ...(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include--
>
> (A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;
>
> (B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;
>
> (C) individuals employed by a marina and who are not engaged in construction, replacement, or

expansion of such marina (except for routine maintenance);

(D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under this chapter;

(E) aquaculture workers;

(F) individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length;

(G) a master or member of a crew of any vessel; or

(H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net.

if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily unused by an employer in loading, unloading, repairing, or building a vessel). ...

§904. LIABILITY FOR COMPENSATION

(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor. ...

§905. EXCLUSIVENESS OF LIABILITY

(a) Employer liability; failure of employer to secure payment of compensation

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant,

> or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer or a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

STATEMENT OF THE CASE

Garvin, a longshoreman, was injured losing both arms in an electrical accident while working on a pier over navigable waters of the United States on the Cooper River in the Port of Charleston, South Carolina. At the time of his injury, Garvin was servicing a large apparatus used in unloading alumina ore from ocean going vessels. The apparatus was owned by Alumax of South Carolina, Inc. ("Alumax"), an acknowledged general contractor. Garvin's immediate employer, the Lemm Corporation, (Lemm) is an acknowledged subcontractor of Alumax.

Lemm provided compensation to Garvin under §904 of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA).

Garvin continues to receive benefits under the Act.

Garvin instituted a third-party action at law against Alumax as a §905(a) general contractor in negligence and strict tort liability, based on the substantive tort law of the State of South Carolina. Alumax moved for an order of dismissal in the District Court based on a claim of immunity as a "statutory employer" under the South Carolina Worker's Compensation Act, §42-1-10, et seq., S.C. Code of Laws, 1976.

The District Court found that the LHWCA provision concerning immunity, §905(a), allowed suit against a general contractor such as Alumax, where the subcontractor as opposed to the general contractor had provided the injured employee with compensation under §904. The District Court held that §905(a) and the South Carolina statutory provision defined the term "employer" differently in this context, federal law disallowing

immunity, the state law granting immunity. The District Court found a conflict between these provisions existed and held that the federal statute prevailed because of the Supremacy Clause of the Constitution of the United States, Art. VI, Cl. 2.

The District Court based its jurisdiction on 28 U.S.C.A. §1331 and certified the issues decided in its order to the Court of Appeals. The Court of Appeals reversed the decision, opining that although the SCWCA and LHWCA differently defined the term "employer" for purposes of immunity, there was no conflict between the statutes, because §905(a) was not intended to apply to third party tort actions at law, in which substantive tort principles are supplied by state law, even though the injured employee is otherwise entitled to the benefits of LHWCA.

ARGUMENT AND REASONS FOR GRANTING THE WRIT OF CERTIORARI

Petitioners respectfully urge that this Honorable Court grant the within Petition for a Writ of Certiorari on the following grounds:

1. The decision is in conflict with another Federal Court of Appeals on the same matter;

2. The decision decides a federal question in a way in conflict with a state court of last resort;

3. A decision on the issue is special and important because it will serve to confirm the separation of powers between the Judicial and Legislative branches of the Federal Government as mandated by the Constitution of the United States. This general consideration takes on special significance herein because Congress amended §905(a) in 1984 to make clear that suit is allowed against a general contractor such as Alumax. The amendment was in response to Washington Metro Area Transit Auth v. Johnson, ___ U.S. ___, 104 S.Ct. 2827 (1984) (WMATA), a

non-admiralty case, which had interpreted §905(a) in such a manner as to grant general contractors immunity in unprecedented circumstances. Such clear Congressional intent on the precise issue involved here should not be ignored by a Court of Appeals without correction by this Court, lest the proper equillibrium between the two branches of government be upset.

The Court of Appeals correctly determined that "it is now perfectly clear that LHWCA extends no immunity to Alumax," 787 F.2d 910 at 916. Despite this correct conclusion and despite the fact that Garvin and Alumax are both subject to LHWCA, and despite the fact that Garvin is drawing benefits under LHWCA, the Court applied the South Carolina statute which contrary to LHWCA grants immunity to one such as Alumax.

This holding is at odds with the Fifth Circuit Court of Appeals which has held that LHWCA immunity provisions

contained in §905(a) override a state statute in conflict. Thus, in Jenkins v. McDermott, Inc., 723 F.2d 229 (5th Cir. 1984) vac. in part, 742 F.2d 191, (1984), the Court rejected an argument that since the longshoreman's injury was land-based the state law should define immunity for general contractors rather than LHWCA. This decision was vacated subsequently because of the holding in Washington Metro. Transit Auth., supra. Its reasoning is helpful and applicable, however, because §905(a) was amended, expressing that WMATA should have no precedential value, subsequent to vacation of the decision. Similarly, in Martin v. Ingalls Shipbuilding, 746 F.2d 231 (5th Cir. 1984), the Court of Appeals reversed the District Court's judgment that a ship worker's common law negligence suit against a general contractor was barred by Mississippi's statutory immunity provision. The decision was based on Congressional intent as expressed in

amendment to §905(a) in response to Washington Metro. Transit Auth.

The petition should be granted on the additional basis that the Garvin decision of the Court of Appeals decides a federal question in a way in conflict with a state court of last resort.

In Fillinger v. Foster, 448 So.2d 321, cert. den. 105 S.Ct. 223 (1984), the Supreme Court of Alabama was confronted with an issue analogous to the present. There, plaintiff was injured while working as a "shipfitter" in a land-based operation. He was covered, however, by the LHWCA. An action at law based upon Alabama tort law was brought against a co-employee, which action was allowed under the Alabama worker's compensation scheme. Section 933(i) of LHWCA, however, provides that "compensation" under that Act is the exclusive remedy to an employee when injured by the negligence of a fellow employee. The Court held that §933(i)

controlled and preempted the conflicting Alabama provision, and noted

> [w]e are of the opinion that the LHWCA and the law of Alabama are in serious conflict as to the maintenance of co-employee suits, and because that is the case, we hold that the federal law will preempt state law. p. 326

Finally, the within petition should be granted because Congress has made clear that it intends general contractors to be subject to actions at law in the circumstances of this case. The legislative history of the 1984 Amendment to §905(a) demonstrates a strong Congressional rejection of immunity to general contractors in the circumstances of this case. The report of the Conference Committee states that WMATA "changed key components of what had widely been regarded as the proper rules governing contractor and subcontractor liability.... WMATA, the conferees believe, does not comport with the legislative intent of the Act nor its interpretations from 1927 through 1983.

The case should not have any precedential effect." 1984 U.S. Code Cong. and Admin. News 2774.

WMATA was a non-admiralty case and the Amendment to §905(a) makes no distinction between admiralty and non-admiralty cases.

A finding that "Congress has not purported to prescribe the immunity rules to be applied by states in actions brought upon state law," where LHWCA otherwise applies ignores the recent legislative history of the amendment and the clear language of §905(a). The finding that Congress has no interest in a LHWCA claimant's suit against the general contractor because the third-party suit falls on the state side of the rigid line drawn between state and admiralty tort jurisdictions, patently flies in the face of the 1984 Amendments to LHWCA, and Court interpretations since 1927.

In its 1984 Amendments, Congress fine-tuned LHWCA by limiting the Act's

coverage to specific groups in which Congress declared a federal maritime concern. Section 902(3) as amended, defines these protected groups as longshoremen, ship repairers, ship builders and ship breakers. Other injured parties, whether on water or land, are not subject to the Act where state compensation benefits are available. Section 902(3)(A-F). But Congress clearly intended for longshoremen to receive the full advantages of LHWCA which includes §905(a).

Congressional judgment as to which groups should be protected by the Act has not been made on rigid notions of the situs of the injury borrowed from the admiralty tort jurisdiction, but on a general value judgment as to the nature of the work performed (longshoring, shipbuilding, etc.) and a more flexible situs requirement. To hold in these circumstances that not all the provisions of the Act are applicable once the Act is

properly invoked, in deference to state law, is to totally ignore that the Congress in the 1984 amendments has determined which worker's activities should be ceded to the states and which are of peculiar federal concern.

Congress in the 1984 amendments spoke clearly to the general contractor issue. The parties hereto are subject to the Act. Congress has expressed a special concerning for a limited group of people, which includes Garvin. The Court's holding that this particular provision of the Act is not applicable, if not corrected, is tantamount to judicial usurpation of legislative power.

Additionally, the Court of Appeal's holding that application of §905(a) immunity tracks the line drawn between admiralty and state tort jurisdiction, if uncorrected, would tend to render meaningless other clauses of §905(a).

For instance, Section 905(a) grants immunity to employers from suits "at law

or in admiralty". Actions at law are distinct from those in admiralty, having a separate constitutional basis. Article III, Section 2, Clause 1, Constitution of the United States. For purposes of LHWCA, actions "at law" have been defined as follows:

> [T]he action "at law" referred to in the Act is essentially one for common law negligence which the statute modified by removing the defenses of negligence of a fellow servant, assumption of the risk, and contributory negligence. It is the same remedy which appellant would have had if the Longshoremen's Act had not been passed.

Gould v. Bird & Sons, Inc., 485 P.2d 458 (Wash. 1984) (emphasis added).

Furthermore, the abrogation of defenses to a defaulting employer who would otherwise be immune under §905(a) are defenses which are peculiar to actions at law. Contributory negligence, assumption of the risk, and negligence of fellow employees have no place in admiralty. Comparative fault obtains whether the action is bottomed on Court

created admiralty law or statutory admiralty law such as the Jones Act, 46 U.S.C. §688. Congress would not have abrogated defenses that do not exist in admiralty, if suits under 905(a) are limited to admiralty cases. There is not a third-party action conceivablely available to a longshoreman, other than those in admiralty, available by virtue of federal law. But as to these, the abrogated defenses have no application. The "at law" actions must refer to state common law actions.

With Congressional intent so clear, it is puzzling how the Court of Appeals found no conflict between federal and state law, where they both address the same issue differently. A holding that LHWCA defers to the state statute where the state statute is more restrictive than the federal ignores judicial history. There never has been a debate as to whether state law takes precedence over specific aspects of the federal

compensation scheme. The debate was whether state compensation law could operate at all where the federal act applied. See 787 F.2d 910 at 915. And Sun Ship, Inc., v. Pennsylvania, 470 U.S. 715, 100 S.Ct. 2432, 65 L.Ed.2d 458 (1980), makes clear that state concurrent schemes cannot be restrictive of LHWCA. Indeed the issue of preemption of state exclusivity provisions was addressed in dictum in note 6 to the decision which reads,

> At any rate, although the question is not directly before us, we observe that if federal preclusion ever need be implied to cope with the remote contingency, a less disruptive approach would be to preempt the state compensation exclusivity clause, rather than preempt the entire state compensation statute.... (emphasis added) pg. 2439.

Finally, a reversal would preclude the individual state legislatures from altering immunity rules, rules concerning suits by fellow employees and the abrogation of defenses addressed by LHWCA

BEST AVAIL

with regard to third party suits at law brought by LHWCA claimants.

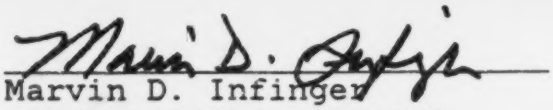
CONCLUSION

In light of clear Congressional intent on the issue, Petitioners respectfully request that the writ be granted. The writ would be an appropriate act of deference to Congress and a protection of the separateness of the Legislative and Judicial Branches. Granting of the writ would also have the salutory effect of resolving a conflict on the issue presented as between the Fourth Circuit Court of Appeals and the Fifth Circuit Court of Appeals and the Supreme Court of Alabama.

Respectfully submitted,

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APPENDIX

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APPENDIX A

No. 84-1156

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Barbara J. Garvin,
James Edward Garvin, Jr.,

Appellees,

versus

Alumax of South Carolina, Inc.,
a Delaware Corporation,

Appellant,

and

Alesa Alusuisse Engineering, A.G.,
a Swiss Corporation, Reggiane, an
Italian Corporation and Specimas,
an Italian Corporation,

Defendants.

Appeal from the United States District Court for the District of South Carolina, at Charleston. Falcon B. Hawkins, District Judge. (C/A 82-1902, 82-1903)

Argued: October 2, 1984
Reargued: February 5, 1985
Decided: April 1, 1986

Before RUSSELL and MURNAGHAN, Circuit Judges, and HAYNSWORTH, Senior Circuit Judge

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Henry B. Smythe, Jr. (David B. McCormack, Buist, Moore, Smythe & McGee on brief) and M. Dawes Cooke, Jr., (Barnwell, Whaley, Patterson & Helms on brief) for Appellant; George E. Campsen, Jr. (Marvin D. Infinger, Sinkler, Gibbs & Simons on brief) for Appellees.

HAYNSWORTH, Senior Circuit Judge:

Garvin was seriously injured while doing maintenance work on a ship loader located upon a pier. He was collecting compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 901 et seq., when he filed this action against the firms that allegedly designed and manufactured the machine and some of its component parts and against the contractor-owner of the machine who had contracted with Garvin's immediate employer for its operation and maintenance. He alleged liability under the South Carolina Strict Liability statute, S.C. Code § 15-73-10 et seq., and in negligence. Alumax, the contractor and owner of the unloader, was not a seller of the machine and the claim against it was

grounded solely upon common law negligence.

Alumax filed a motion to dismiss on the ground that it was the statutory employer of the plaintiff and immune from this common law tort action against it under South Carolina's Workmen's Compensation Act, § 42-1-540. The district court denied the motion, reasoning that since the LHWCA affirmatively extends immunity only to the subcontractor, which had procured compensation insurance, the two statutes were repugnant, the federal Act took precedence under the supremacy clause, and Alumax was not immune from suit.

While the case against all the other defendants is pending, the district court certified its decision for an immediate appeal under the provisions of 28 U.S.C.A. § 1292(b). This court granted leave to appeal.

Finding no repugnancy in the two statutes in the context of this state law

tort claim, we reverse and hold that Alumax is entitled to the immunity conferred upon it by South Carolina law.

I.

Alumax is an importer of alumina ore, which it converts into aluminum. It is a joint lessee of a terminal near Charleston, South Carolina, for the unloading of ocean-going vessels and is the owner of the alumina ore unloading machine installed on the pier.

The terminal is operated by Lemm Corporation-Operations, Garvin's immediate employer, and it is responsible for the operation and maintenance of the unloading machine. Lemm procured workmen's compensation insurance, as it was contractually required to do, but the premium costs were treated as costs of operation that Alumax paid.

While performing routine maintenance work on the unloading machine, Garvin came in contact with electrically energized

members. He was severely shocked and suffered the loss of both arms.

II.

Preliminarily, we address the question of our subject matter jurisdiction, though we conclude that we have jurisdiction to adjudicate the merits of the question presented by the parties.

Garvin and his wife filed their original complaints in the United States District Court for the District of South Carolina. They alleged that federal jurisdiction was present because of diversity of citizenship and the presence of the requisite amount in controversy. That allegation, though correct as to all of the other defendants, turned out to be incorrect as to Alumax. Alumax, however, did not immediately raise the jurisdictional question. Instead, it moved for a dismissal on the ground that it was Garvin's statutory employer and that neither Garvin nor his wife, claiming

through him,[1] had any cause of action against it for his work-related injury.

In order to avoid dismissal of the complaint on the merits, Garvin filed a second amended complaint. In that complaint, he alleged federal question jurisdiction. Specifically, it was alleged that Garvin was receiving compensation under the LHWCA; that under that statute, as amended, Alumax, as the remote employer, had no immunity; that the federal and state statutes were repugnant; and that the provisions of the federal status should prevail under the Supremacy Clause. Conceding that there was no right of action under state law, it was alleged that a determination that the federal statute had the meaning and the effect for which the plaintiff contended was "essential" to his cause of action.

---

1. The wife's claim is derivative, and her pleadings and contentions track those of her husband. What we say of his claim applies also to hers.

As indicated earlier, the district judge was persuaded, holding that the two statutes, indeed, were repugnant and that the federal statute prevailed rendering inapplicable South Carolina's protection of statutory employers.

It may well be that we are all agreed that the LHWCA does not purport to create any rights of action in consequence of any land based injury not caused by a vessel. At least by indirection, however, it is the contention of the plaintiff, and the holding of the district judge, that it does. The South Carolina statute, § 42-1-540, provides that acceptance of the compensation scheme "shall exclude all other rights and remedies of such employee" and those claiming through him. If that provision is rendered inapplicable to the LHWCA, as amended in 1984 specifically to permit injured employees of subcontractors to sue the general contractor unless the subcontractor had failed to procure compensation insurance

and the general contractor had been compelled to do so, then the LHWCA has created a cause of action when none otherwise would exist. Its creation may be somewhat indirect when, under the South Carolina statutes, Garvin has neither right nor remedy, but plaintiff's claim of a right to sue is clearly derived from the federal statute.

The South Carolina statute speaks in terms of the exclusion of all other rights and remedies. If a covered employee of a complying employer is injured on the job, a right of compensation accrues, but no common law action for damages accrues as against his immediate or remote employer. When one views the state scheme in terms of the plaintiff's search for a right to sue, the invocation of the federal statute takes on a decidedly "offensive" cast. The plaintiff has an immediate need for the federal provision because, without it, he may not proceed.

For convenience, however, the

statutory deprivation of an injured employee of his right of action against his employer is frequently described as the employer's immunity. If one speaks in terms of immunity, the effect of the federal statute might seem a bit more indirect. It might be argued that South Carolina has always preserved the right of action by an injured employee against a statutory employer and provided an appropriate remedy, but, at the same time, has clothed the statutory employer with immunity. In that posture, the plaintiff's contention is given a more defensive coloration. If it is thus contended that an injured employee may state a perfectly good claim against his statutory employer for negligent infliction of physical injury and the statutory employer's reliance upon the statute is labeled a claim of immunity, then the plaintiff's reference to the LHWCA may seem a federal response to an anticipated state law defense. This,

however, is only a circuitous statement of the plaintiff's claim that the LHWCA gives him a right to proceed which otherwise he would not have.

Federal question jurisdiction can be invoked only when the federal question appears on the face of the plaintiff's complaint. Usually, the plaintiff's right must be, in part at least, a federal right, and federal question jurisdiction may not be invoked by an allegation of an anticipated federal defense or a federal response to an anticipated state law defense. See Louisville & Nashville Railroad Co. v. Mottley, 211 U.S. 149 (1908). Mottley is at one end of the spectrum. The plaintiffs stated a perfectly good breach of contract claim governed entirely by state law. They went further, however, and alleged that the Railroad sought to justify or excuse its non-performance by reference to a recently enacted federal statute governing the issuance of passes to railroad passengers.

They went still further and alleged that the federal statute was unconstitutional as applied if it were held to require that the Railroad refuse further performance of its contractual obligation.

There, the federal statute was clearly separable from the plaintiffs' claim. The plaintiffs' cause of action was sufficiently stated without reference to the federal statute. The reference was only in anticipation of the Railroad's defense.[2]

---

2. The aftermath of Mottley is interesting. The case proceeded through the courts of Kentucky in which the Mottleys prevailed, but the Supreme Court then took the case to consider the federal questions it had refused to consider two years earlier. It then held that the federal statute required the Railroad to decline to renew its free passes and that the statute was constitutional as applied despite the fact that it deprived the Mottleys of part of the consideration for which, many years before, they had released their tort claims for damages for physical injury. See Louisville & Nashville Railroad Co. v. Mottley, 219 U.S. 467 (1911).

The plaintiff concedes that he has no right of action under South Carolina law; he claims that he does have a right of action under the LHWCA and alleges that a construction and application of that statute in accordance with his contentions is essential to his cause of action. Whether one accepts the plaintiff at his word, however, and looks upon the federal statute as an essential ingredient of the plaintiff's claimed cause of action, or whether one looks upon the federal statute, as construed by the plaintiff, as stripping away the state created absolute immunity of the defendant, leaving it open to the plaintiff's attack, should make no difference. A determination of whether a federal question is appropriately alleged in the plaintiff's complaint should not depend upon subtle choices of emphasis. The situation should be viewed realistically. The defendant is in its citadel with all of the protection of the South Carolina

statute. The plaintiff may successfully assault it only from a foundation of some federally derived right, for he has no right of action under state law. He alleges that federal right, and we should accept the allegation as appropriate to his claim.

At the time of Mottley, the prevailing view was that, for jurisdictional purposes, a cause of action could not be said to arise under the laws of the United States unless the right of action was a creature of the laws of the United States. See American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257 (1916). Federal jurisdiction does not exist, it was said, unless federal law "create[s] at least a part of the cause of action by its own force." Smith v. Kansas City Title & Trust Co., 255 U.S. 180, 215 (1921) (Mr. Justice Holmes, dissenting).

That view, however, was very substantially relaxed by the Supreme Court in the Smith case. That was a suit by a

shareholder to prevent the directors of the corporation from investing corporate funds in bonds issued by a federally chartered land bank. The action was brought under a Missouri law which limited the bank's investment of funds to "valid" securities. The plaintiff alleged that the federal land bank's bonds were invalid because the authorizing act of Congress was unconstitutional. Despite the procedural remoteness of the federal question, the Supreme Court held that federal question jurisdiction existed "because the controversy concerns the constitutional validity of an act of Congfess which is directly drawn into question." Id. at 201. Not surprisingly, Mr. Justice Holmes dissented. Under his strict view there could be no jurisdiction because Missouri alone had created the cause of action. State law provided the right and the remedy to confine the directors to lawful investments; federal law had no operative force of its own in

the case, and the state's adoption of it for the purpose of determining whether the bonds were valid or invalid did not make the cause of action one arising under federal law. Id. at 215.

It is true that Smith's cause of action was strictly the creature of state law, but the Supreme Court majority took the practical view and recognized that the only substantial legal question in the case was the validity of the bonds, and that was a federal question. At issue was the validity of an act of Congress, and pragmatic considerations strongly suggest that it was the kind of case that belonged in the federal courts.

The Smith case ushered in a new era. By 1964, Judge Friendly could say with some assurance that "[e]ven though the claim is created by state law, a case may 'arise under' a law of the United States if the complaint discloses a need for determining the meaning or application of such a law." T. B. Harms Co. v. Eliscu,

339 F.2d 823, 827 (2d Cir. 1964). Except when the need is only collateral or peripheral or relevant only to a separable defensive claim, federal question jurisdiction should be found to exist if the complaint discloses that the result will turn in substantial part upon the resolution of the federal question. See Gully v. First National Bank, 299 U.S. 109, 118 (1936).[3]

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3. The Supreme Court's decision in Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983), does not militate against our conclusion. There, the state of California sought a state declaratory judgment of the validity of its regulations, but alleged that the defendant claimed that enforcement and application of the regulations was precluded by federal preemption. The defendant undertook to remove the case to a United States district court. There, the preemption claim was clearly and exclusively defensive. Here, the plaintiff asserts federal preemption and alleges that his right of action is dependent upon it. The Supreme Court in Franchise Tax Board said there is federal jurisdiction to "hear ... those cases in which a well-pleaded complaint establishes ... that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law." Id. at 27-28. This is such a case.
(Continued)

This court has adopted that approach. Christopher v. Cavallo, 662 F.2d 1082, 1083 (4th Cir. 1981). Other cases seem consistently to take the practical, pragmatic approach of Eliscu and Christopher.[4]

The plaintiff's complaint alleges a federal question. Resolution of that question in a manner favorable to him, he says, is essential to his cause of action. Indeed, in the present posture of the case, it is the only legal question presented. If that question is resolved unfavorably to him, he loses; if resolved favorably to him, there may be factual disputes leading to findings about negligence and contributory negligence,

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See also Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983), where the plaintiff's claim was that the state laws regulating it were preempted. There, federal jurisdiction was upheld. Id. at 96 n. 14.

4. See, e.g., Mountain Fuel Supply Co. v. Johnson, 586 F.2d 1375, 1381 (10th Cir. 1978); Sweeney v. Abramovitz, 449 F.Supp. (Continued)

but, as between the plaintiff and Alumax, the record does not disclose any other substantial, lurking legal question.

Since the plaintiff's complaint presents a substantial federal question which it is necessary to determine, we conclude that federal question jurisdiction is present. That there is jurisdiction to adjudicate, however, does not suggest that the plaintiff must necessarily prevail on that question. A federal court does not lose jurisdiction to adjudicate because resolution of the federal question ultimately goes against the plaintiff. See Bell v. Hood, 327 U.S. 678, 682 (1946). In determining our jurisdiction, it is enough to observe that the district judge adopted the plaintiff's

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213, 214 (D. Conn. 1978). See also Stone & Webster Engineering Corp. v. Ilsley, 690 F.2d 323, 328 (2d Cir. 1982) (action for a declaratory judgment turns on construction of federal energy law); Chengfan Hsu v. Philippine Air Lines, Inc., 98 F.Supp. 805, 806 (N.D. Cal. 1951) (state law negligence action "hinges" on construction of federal immigration law).

contentions, and this court cannot say that the contentions are insubstantial or frivolous.

III.

There is a long history of congressional deference to the workmen's compensation acts of the states with respect to maritime employees other than masters and members of the crews of vessels. When, in 1917, the Supreme Court held in Southern Pacific Co. v. Jensen, 244 U.S. 205, that New York's workmen's compensation act could not be constitutionally applied to the employer of a longshoreman injured while engaged on shipboard in the unloading of the ship, the Congress twice attempted to avoid the Jensen bar and to authorize the extension of state workmen's compensation acts to maritime injuries of longshoremen and other harbor workers. Those efforts were held unavailing as in violation of the

federal Constitution. Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920), Washington v. W. C. Dawson & Co., 264 U.S. 219 (1924). Finally, the Congress, responding to a Supreme Court suggestion, enacted the LHWCA providing federal compensation coverage for such maritime workers, but the Act was to apply only if the relevant state's workmen's compensation act might not be validly applied. Thus, the Congress sought to draw the line between federal and state authority at the outer limits of the reach of the state's constitutional power to enforce and apply its workmen's compensation act.

The bright line that the Congress sought to draw between federal and state authority proved to be fuzzy. Injuries were suffered under circumstances in which no one could confidently predict in advance on which side of the constitutional boundary they fell. The practical problems led the Supreme Court

to carve out a "twilight zone." Within that zone, the Supreme Court held there was concurrent jurisdiction and the injured worker might safely proceed under either the LHWCA or the state's workmen's compensation act at his election. Davis v. Department of Labor, 317 U.S. 249 (1942).

In Calbeck v. Travelers Insurance Co., 370 U.S. 114 (1962), the Supreme Court held that the LHWCA was applicable in the "maritime but local" zone, even though there was little doubt that the state's workmen's compensation act could be applied validly. Thus, under the decisions of the Supreme Court, there came to be recognized zones in which both the federal statute and the relevant state statute were applicable.

The Congress substantially extended the zone overlap when it adopted the 1972 amendments to the LHWCA. The immediate purpose of the Congress was to increase the level of compensation payments under

the federal statute, but it was also concerned with the disparity between the levels of the enhanced compensation under the federal statute and the compensation available under the statutes of some of the maritime states. Longshoremen engaged in unloading or loading a vessel passed to and from ship and pier and it was thought to be inequitable to have marked differences in the level of available compensation depending upon whether the injury was suffered on shipboard or on the pier. Consequently it extended the coverage of the LHWCA to include injuries to longshoremen and other harbor workers suffered on piers adjoining navigable waters of the United States and other adjoining installations customarily used in the loading, unloading, repairing or building vessels. See 1972 U.S. Code, Cong. & Adm. News pg. 4698, et seq.

The shoreward extension of the LHWCA in 1972 was not intended to set up an exclusive federal regime. It was an

extension of previously recognized zones of overlapping federal and state authority. That was the holding of the Supreme Court in Sun Ship Inc. v. Pennsylvania, 447 U.S. 715 (1980). There the injured employees were clearly covered by the LHWCA, as amended in 1972, but Pennsylvania had increased the level of its workmen's compensation benefits to the point that they exceeded those available under the LHWCA. The employees claimed benefits under the state statute, and the Supreme Court held they were entitled to the state benefits because of the concurrent applicability of the federal and state statutes.

At the time of his injury, Garvin was working on the pier. No vessel was alongside, and it is not alleged that the fault of any vessel had contributed in any way to the condition of the unloading machine or to Garvin's injury. Since the pier was adjacent to navigable waters of the United States, he was within the

coverage of the LHWCA as extended in 1972, but he was also clearly within the coverage of the South Carolina Workmen's Compensation Act because piers have always been recognized as extensions of land within the authority of the state and not within the authority of the LHWCA until its extension in 1972. As demonstrated by Sun Ship, he was free to proceed under the state statute if that route appeared advantageous to him. He chose, of course, to claim the higher benefits available under the federal statute, and the question is whether that choice limits the defenses available to a contractor in the position of Alumax when faced with a tort action founded entirely upon South Carolina law.

IV.

Against this background of congressional concern to preserve and protect application by the states of their own workmen's compensation schemes and the purpose of the LHWCA's 1972 landward

extension to "supplement," not to "supplant," state compensation acts, Sun Ship, supra, we approach the particular problem of this case.

On June 26, 1984, the decision of the Supreme Court in Washington Metropolitan Transit Authority v. Johnson, ___ U.S. ___, 104 St.Ct. 2827 (1984), was announced. There it appears that the WMTA, prompted by practical and financial considerations, had procured workmen's compensation insurance for the employees of all of its many subcontractors. Faced with tort actions by some of those employees in the District of Columbia, WMTA claimed immunity under the LHWCA, and the Supreme Court held that a general contractor in the position of WMTA, and Alumax, was entitled to that tort claim immunity. As so interpreted, the LHWCA and South Carolina's Workmen's Compensation Act were completely congruent.

There was swift congressional

reaction. By P.L. 98-426, signed on September 28, 1984, 33 U.S.C.A. § 905 was amended by adding a sentence

> "For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employee only if the subcontractor fails to secure the payment of compensation required by § 904...."

The Congress was of the view that LHWCA immunity should extend to a contractor only if he secured the payment of compensation for the employees of subcontractors by force of the statutory requirement of § 904. It was stipulated that the amendment should apply to pending cases. Hence, it is now perfectly clear that LHWCA extends no immunity to Alumax. There is nothing in that amendment or its legislative history, however, to indicate a congressional intention to restrict the application of state created immunity of contractors in situations in which the state statute traditionally had been applied.

It was necessary, of course, for the

Congress in LHWCA to deal in some fashion with employer immunity. That statute has exclusive application in the District of Columbia and to most injuries suffered on the navigable waters of the United States. In those areas, the Congress was free to determine for itself under what circumstances a general contractor would be immune from tort actions by employees of a subcontractor, but nothing done in the Congress suggests that it intended to modify immunities provided general contractors by state workmen's compensation laws, when those laws are applicable.

Except with respect to claims against vessels addressed in 33 U.S.C.A. § 905(b), the LHWCA does not address the substantive rights of claimants against third parties. There are housekeeping provisions in 33 U.S.C.A. § 933. The right to maintain a third party action will not be waived by the acceptance of benefits, and there are provisions for the management of any such

third party action as between the injured person and his employer and for the distribution of any proceeds derived in the third party action between the injured employee and his employer or subrogated insurance carrier. The federal statute seeks to protect and preserve whatever rights an injured claimant may have against third parties and to provide the terms upon which an employer or its insurance carrier may be a participant in, and beneficiary of, the prosecution of such claims. The federal statute lays down some procedural rules, but it does not create any cause of action against a third party, except with respect to claims against vessels, or to define circumstances affecting the right of the insured claimant to prevail in any action that may be brought against a third party.

As initially enacted, when the application of the LHWCA stopped at the water's edge, the third party claim would usually be one in admiralty. When

application of the federal statute was moved inland to supplement state workmen's compensation statutes without displacing them, a third party claim under state law by a recipient of benefits under the LHWCA was not converted into a maritime claim. Its scope, including available defenses, is governed by state law. Thus in Holland v. Sea-Land Service, 655 F.2d 556 (4th Cir. 1981) cert. denied 455 U.S. 919 (1982), we held that the defendant, in an action brought by a recipient of benefits under the LHWCA for damages on account of injury for which he was receiving compensation, could defend on the basis of the state's contributory negligence rule.

A similar result was reached in Millspaugh v. Port of Portland, 25 Ore. App. 389, 671 P.2d 743 (1983), in which it was held that Oregon's rule of municipal immunity is applicable to such a claim.

The Supreme Court itself left no doubt about the matter in Victory Carriers, Inc., v. Law, 404 U.S. 202

(1971). The third party action, when founded on state law, is a creature of state law and is to be governed entirely by it. Indeed, in Ferri v. Ackerman, 444 U.S. 1983 (1979), the Supreme Court stated with respect to such a third party claim by an LHWCA compensation recipient:

> When state law creates a cause of action, the state is free to define the defenses to the claim, including the defense of immunity, unless the state rule is in conflict with federal law.

The South Carolina rule of immunity of a contractor in the position of Alumax is different from that under the LHWCA, but not in conflict with it, for Congress has not purported to prescribe the immunity rules to be applied by states in actions brought upon state law claims. The federal immunity rule is to be applied when the third party claim is a federal claim; when the third party claim is a state law claim, the immunity rules of that state are to be applied. The federal and state statutes are readily harmonized,

and each may function in its own sphere without interference with the other.

We are admonished not to seek out conflicts between federal and state laws "where none clearly exists" or to strike down state laws under the Supremacy Clause when application of the state law will result in no frustration of federal law. Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978); Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc., 372 U.S. 714 (1963); Florida Lime & Avocado Growers, Inc., v. Paul, 373 U.S. 132 (1963); Gary Aircraft Corp. v. General Dynamics Corp., 681 F.2d 365 (5th Cir. 1982).

Congress has diligently attempted to preserve state law governance of state law third party claims by recipients of LHWCA compensation. Since there is no conflict between differing rules of immunity and application of South Carolina's rule will not frustrate the effectiveness of any federal law, Alumax, the contractor, is

immune from this state tort claim.

V.

The judgment of the district court is reversed and the case remanded with instruction to enter judgment for Alumax. The case may then proceed against the other defendants.

REVERSED AND REMANDED.

MURNAGHAN, Circuit Judge, dissenting:

I conclude that the proper disposition of the present case is to dismiss for lack of federal jurisdiction, rather than to enter judgment for Alumax. I am persuaded not only that we lack jurisdiction over the matter, but also that it would be preferable to allow the parties to seek an interpretation of the South Carolina worker's compensation statute in the South Carolina courts. I therefore respectfully dissent.

I.

Alumax, Inc., operates a port facility in South Carolina. Under the terms of a contract between Alumax and

Lemm Corporation, Lemm employees handle the unloading of ships and perform maintenance work on the unloading equipment. Lemm arranges for insurance policies to cover its workers' compensation obligations, but Alumax reimburses the cost of the policies as part of the contract price for Lemm's services.

James Garvin, a Lemm employee, was injured while performing maintenance work on a ship unloader on a pier in the port facility operated by Alumax. As the result of an electrical shock, Garvin lost both arms. He was eligible to receive compensation benefits under either the federal Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901, et seq., or the South Carolina workers' compensation statute, S.C. Code Ann. Title 42. He elected to receive benefits under the LHWCA.

The LHWCA and the South Carolina act differ in at least one important respect.

The LHWCA's compensation scheme is limited to immediate employers, even where the immediate employer is acting as a subcontractor. Only the immediate employer is obliged to provide compensation benefits, and only the immediate employer receives immunity from tort suits by injured employees. The general contractor has no obligation to secure benefits, and if it voluntarily does so, or if it pays the cost of compensation insurance secured by the subcontractor, it nevertheless generally receives no immunity from tort suits. The only exception to the rule, not applicable to the facts of the present case, occurs when the subcontractor fails to fulfill its obligation to secure a source of compensation benefits.[5] In that event

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5. The general contractor may not obtain tort immunity for itself simply by agreeing with its subcontractors that it will undertake to secure a source of benefits so that they need not do so. The general contractor may obtain immunity by (Continued)

alone, the obligation and the concomitant immunity shift to the general contractor. 33 U.S.C. §§ 904(a), 905(a), as amended by P.L. 98-426, 98 Stat. 1639 (1984).[6]

The South Carolina statute, on the other hand, extends the terms of its

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securing compensation only after the subcontractor actually fails to do so. See H.R. Rep. No. 98-1027 (Conference Report), 98th Cong., 2 Sess. (1984), reprinted in 1984 U.S. Code Cong. & Ad. News 2771, 2774.

6. Section 904(a) provides:

> Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor.

Section 905(a) provides:

> The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such

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workers' compensation scheme to general contractors such as Alumax who are not immediate employers. The general contractor is liable to pay workers' compensation benefits to employees of subcontractors. S.C. Code Ann. § 42-1-400 (1976). In exchange, the general contractor receives immunity from tort actions brought by such employees. S.C. Code Ann. § 42-1-540 (1976).

After electing to receive benefits under the LHWCA, Garvin sought to sue Alumax under South Carolina tort law. Alumax is in the position of a general contractor, and Garvin's employer, Lemm, is in the position of a subcontractor. Because Lemm has not failed to secure the payment of compensation, it is indisputably clear that the LHWCA provides

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employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death...

no immunity from suit for Alumax. However, Alumax claims immunity under the South Carolina workers' compensation statute.

II.

Federal jurisdiction to decide cases exists only within the scope of one of the federal jurisdictional statutes. Because the present case involves the Longshoremen's and Harbor Worker's Compensation Act, a federal statute, it might be thought that jurisdiction exists under 28 U.S.C. § 1331, which provides for jurisdiction in the federal courts over "civil actions arising under the Constitution, laws or treaties of the United States." This grant of jurisdiction is commonly referred to as "federal question" jurisdiction.[7]

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7. Federal question jurisdiction is the only type of jurisdiction that is even arguably applicable here. Because Garvin and Alumax are both citizens of South Carolina (Garvin having alleged diversity but having abided by the district judge's (Continued)

However, not every case which implicates a federal statute in some way can be said to "arise under" federal law. An important prerequisite for the existence of federal question jurisdiction is known, somewhat misleadingly, as "the well-pleaded complaint rule." The gist of the rule is very simple. The federal issue that gives rise to jurisdiction must

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determination that plaintiff and defendant, under 28 U.S.C. § 1332(c), shared a common state of citizenship), there can be no jurisdiction based on diversity. Nor does the present case fall within the admiralty jurisdiction of the federal courts. The Supreme Court has made clear that admiralty jurisdiction extends only to injuries occurring upon navigable waters and land-based injuries caused by vessels. It does not reach land-based injuries stemming from other causes, even where those injuries occur during the course of traditional maritime activity. Victory Carriers, Inc., v. Law, 404 U.S. 202, 209-12 (1971). This circuit has held that the geographical extent of admiralty jurisdiction was not altered by the 1972 amendments to the LHWCA, even though those amendments extended the federal compensation remedy to land-based maritime injuries. Holland v. Sea-Land Service, Inc., 655 F.2d 556 (4th Cir. 1981). Because Garvin's injury occurred on land and was not caused by a vessel, his claim is outside the scope of admiralty.

be part of the plaintiff's cause of action.[8] If the federal issue is raised by the defendant as part of an affirmative defense, or by the plaintiff in anticipation of an affirmative defense or in order to defeat such a defense, there is no federal jurisdiction. The Supreme Court has reaffirmed the rule on many occasions. Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 9-12 (1983); Phillips Petroleum Co. v. Texaco, Inc., 415 U.S. 125, 127-28 (1973); Skelly Oil Co. v. Phillips Co., 339 U.S. 667, 672 (1950); Gully v. First National Bank in Meridian, 299 U.S. 109, 112 (1936); Taylor v. Anderson, 234 U.S. 74, 75-76 (1914); Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149, 152-154

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8. The name of the rule--"the well-pleaded complaint rule"-- derives from the idea that a federal issue that is part of the plaintiff's cause of action ought to appear on the face of a well-pleaded complaint.

(1908).[9] It follows that if federal jurisdiction is to exist in the instant case, the federal question which gives rise to jurisdiction must be part of Garvin's cause of action against Alumax, and not a response to Alumax's defense.

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9. In Louisville v. Nashville R. Co. v. Mottley, the Supreme Court confronted what is often viewed as a paradigm situation for the application of the well-pleaded complaint rule. In that case, the plaintiffs had entered into a contract with the Louisville & Nashville Railroad Company, whereby the plaintiffs agreed to release their tort claim for injuries against the Company in exchange for the Company's commitment to provide them with passes for free railroad transportation for the remainder of their lives. The Company complied with this contract until 1907, when it refused to renew the passes. The plaintiffs sued for breach of contract under Kentucky law. The railroad argued that its refusal to comply with the contract was mandated by a 1906 federal statute forbidding the giving of free railroad transportation. The plaintiffs responded that the 1906 statute was unconstitutional on the ground that it deprived them of property without due process of law. Thus, two federal issues were raised: whether the 1906 Act of Congress prohibited compliance with the contract, and whether, if it did, the Act was unconstitutional. Nevertheless, the Supreme Court held that there was no federal jurisdiction. The first federal (Continued)

As the case is now presented to this court, the well-pleaded complaint rule is not satisfied. Garvin's claim is brought pursuant to South Carolina tort law. Count One sounds in "Strict Liability in Tort", Count Two in "Negligence."[10] Alumax's affirmative defense is that it has immunity by virtue of the South Carolina workmen's compensation statute. Garvin responds that the immunity provision in the South Carolina statute is invalid because it conflicts with federal law. Thus, the federal issue does not enter into the case until we come to Garvin's response to Alumax's defense.

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issue was part of the defendant's affirmative defense; the second federal issue was the plaintiffs' response to that defense. Neither of the federal issues were part of the plaintiffs' cause of action, which arose solely under state law.

10. Jurisdiction, as pleaded in the second amended complaint, was based on allegations of diversity as well as of the existence of a federal question, the district court's finding of want of diversity only coming as part of the order denying the motion of Alumax to dismiss.

The federal issue is not part of Garvin's cause of action, which arises solely under state law. As a result, there is no federal jurisdiction.

The majority argues that the LHWCA is part of Garvin's cause of action because Garvin's ability to proceed on his state-law negligence claim depends on the preemptive force of the federal statute. Because Garvin's negligence claim has been destroyed by the state workers' compensation statute unless that statute is preempted by the LHWCA,[11] the majority

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11. The majority makes an unwarranted assumption here. Whether Garvin's negligence claim is in fact defeated by the state workers' compensation statute is an open question requiring an interpretation of state law. It is understandable why the assumption was made. Garvin alleged: "upon information and belief, under the provisions of the S.C. Workman Compensation Act and court interpretation thereof, the Plaintiff is a 'statutory employee' of the Defendant ALUMAX, and, as such, said defendant is immune to the within action under the laws of the State of S.C." Employment of the phrase "information and belief" indicates, though, that the allegation could hardly be taken as a concession. Moreover, the (Continued)

concludes that the LHWCA is a component of his cause of action.[12] The argument is unpersuasive because it is inconsistent with a number of Supreme Court precedents. Each of those cases revealed a pattern similar to the one presented here: (1) a state-law cause of action; (2) a response, either of state or federal law, that bars

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question of statutory status is one of law, not of fact, and as such is not binding on Garvin in the absence of evidence that he intentionally misled the district court. Tenneco Chemicals, Inc., v. William T. Burnett & Co., 691 F.2d 658, 664-65 (4th Cir. 1982). "A judicial admission is normally treated as absolutely binding, but such admissions go to matters of fact which, otherwise, would require evidentiary proof . . . The doctrine of judicial admissions has never been applied to counsel's statement of his conception of the legal theory of the case." New Amsterdam Casualty Co. v. Waller, 323 F.2d 20, 24 (4th Cir. 1963).

12. A first reading of the majority's jurisdictional discussion yields the impression that the majority is persuaded that Garvin's action is brought directly under the terms of the LHWCA, rather than under South Carolina tort law. The opinion states that Garvin "concedes that he has no right of action under South Carolina law," Slip Op. at 5, 8, that "plaintiff's claim of a right to sue is clearly derived from the federal statute," (Continued)

or nullifies the plaintiff's claim; (3) a third level of federal law said to defeat the defendant's response. In none of those cases has the Supreme Court held that federal jurisdiction exists. Instead, the Court has held that, to serve as a basis for federal jurisdiction, the federal issue must appear as part of the plaintiff's initial cause of action. If that initial cause of action arises under state law, jurisdiction is not conferred on the district court by the fact that a federal law "saves" the state-law cause of

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Slip Op. at 6, and that "the LHWCA gives him a right to proceed," Slip Op. at 7. Both parties agree, however, that Garvin's claim is for strict liability or negligence under South Carolina tort law. Garvin's original complaint, amended complaint, and second amended complaint all allege liability due to negligence. Indeed, the LHWCA is mentioned for the first time in Garvin's second amended complaint, which came after Alumax notified Garvin of its intention to move for dismissal on the ground of lack of jurisdiction.

A closer reading of the majority opinion indicates that, in its view, Garvin's cause of action does not arise directly under the LHWCA, but rather
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action from a fatal obstacle.[13]

"derives" from the LHWCA in the sense that the LHWCA "saves" the state-law negligence claim from defeat due to the state workers' compensation statute.

13. An early case that falls into this pattern is Louisville & Nashville RR Co. v. Mottley, 211 U.S. 149 (1908), discussed supra at n.9. It could be argued that, in Mottley, the plaintiffs' state-law contract claim was destroyed or nullified by the enactment of the 1906 federal statute, so that the plaintiffs, in a sense, no longer had a claim under state law. However, the Constitution invalidated the 1906 statute, thereby restoring the plaintiffs' state-law claim. Under the majority's reasoning, then, the Supreme Court should have held that the plaintiffs' claim arose under the Constitution, because the Constitution gave them a right to proceed which otherwise they would not have had. Yet the Supreme Court held that there was no federal jurisdiction to decide the case in Mottley, because the plaintiff's initial cause of action did not present a federal issue.

In Gully v. First National Bank in Meridian, 299 U.S. 109 (1936), the same pattern is repeated. There, the state of Mississippi sued in state court, under state tax laws, to collect taxes owed by a national bank. The bank sought to remove the action to federal court, arguing that the state' claim would have been nullified by the constitutional prohibition on state taxation of federal entities, had it not been for a federal statute expressly permitting state taxation of national banks. Here, too, it could have been
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The majority also concludes that,

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argued that the state-law claim was destroyed, but was then restored by a provision of federal law. Under the majority's reasoning, then, the claim should have been held to arise under the federal statute permitting state taxation of national banks. Nevertheless, the Supreme Court held that federal jurisdiction did not exist because the claim arose under state law.

The majority's reasoning would also have dictated a different result in Phillips Petroleum Co. v. Texaco, Inc., 415 U.S. 125 (1973). There, Texaco brought an action under state law of restitution for the value of helium commingled with natural gas which it had sold to Phillips for the price of the natural gas alone. Phillips set up the defense of payment under fixed rates set by the Federal Power Commission. Texaco responded that the Helium Act Amendments of 1960 precluded the application of FPC rates for natural gas to the sale of commingled natural gas and helium. Texaco's restitution claim was destroyed by Phillips' payment defense; if Phillips had paid its debt, Texaco had no restitution claim under state law. Texaco's claim was revived, however, by the Helium Act Amendments. Under the majority's reasoning, Texaco's claim should have been held to arise under the Helium Act Amendments. The Supreme Court, however, found that the claim arose under state restitution law and that, therefore, federal jurisdiction was lacking.

The rule is not undermined by the Supreme Court's decision in Shaw v., Delta

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because the "arising under" requirement of

Air Lines, Inc., 463 U.S. 85 (1983). There, an airline brought a declaratory judgment action against the New York State Commissioner of Human Rights, seeking a declaration that certain state laws were preempted by ERISA. We, of course, are presented in the case before us with a customary type of lawsuit where the possibility of realignment so that a defendant can artificially recast himself in the guise of a plaintiff, present in a declaratory judgment action, simply does not exist. The question whether federal jurisdiction exists in a declaratory judgment action must be determined by reference to the hypothetical lawsuit that would have been brought if the declaratory judgment remedy did not exist. If, in such a hypothetical action, the federal issue would arise only as a defense or a response to a defense to a state claim, federal jurisdiction is lacking. Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 16 (1983); Skelly Oil v. Phillips Petroleum Co., 339 U.S. 667, 671-72 (1950). The hypothetical alternative action that was considered in Shaw was an action by the airline to enjoin the enforcement of the state laws alleged to be preempted. 463 U.S. at 96 n. 14. A federal cause of action to seek injunctive relief against threatened state action that would be violative of the federal Constitution or other federal law has been recognized since Ex Parte Young, 209 U.S. 123 (1908). Moreover, reasons that do not apply in other contexts militate in favor of exercising jurisdiction over challenges to state action where the state itself or its officials are the defendants. As would be the case in Shaw, without the option of
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28 U.S.C. § 1331 was "very substantially relaxed" by the Supreme Court in Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921), and subsequent circuit court decisions such as T.B. Harms Co. v. Eliscu, 339 F.2d 823 (2d Cir. 1964), cert. denied, 381 U.S. 915 (1965), and Christopher v. Cavallo, 662 F.2d 1082 (4th Cir. 1981), federal jurisdiction should be found to exist whenever the outcome of the case will turn in substantial part on the interpretation of federal law, regardless of whether the federal issue is part of the plaintiff's cause of action or instead related to a defense. In effect, the

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injunctive or declaratory relief in the federal courts, a plaintiff wishing to challenge state regulation would be obliged to disobey state law in order to provoke legal action by the state, possibly in the form of criminal prosecution, so that the challenge could be presented as a defense justifying the noncompliance. The Supreme Court has concluded that it is unreasonable to require a party to subject himself to such risks in order to challenge the validity of state action under the Supremacy
(Continued)

majority concludes that the well-pleaded complaint rule has been abandoned in favor of a more liberal approach to federal jurisdiction. That position is, I submit, incorrect, and I respectfully suggest that the authorities relied on by the majority do not support it. There was no question, in those cases, that the federal issue was part of the plaintiff's case and not raised to overcome an anticipated defense. Rather, the question was whether the federal issue, although properly part of the plaintiff's cause of action, was nevertheless too remote or tangential to serve as the basis for jurisdiction.[14] The line of cases relied on by the

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Clause. Steffel v. Thompson, 415 U.S. 452, 459 (1974); Epperson v. Arkansas, 393 U.S. 97, 100 (1968); Terrace v. Thompson, 263 U.S. 197, 215-16 (1923); Ex Parte Young, 209 U.S. 123, 145-47 (1908). Those concerns are not present in a case such as the one now before us, instituted in the more customary way and involving only a dispute between private parties.

14. In both Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921) and (Continued)

majority stands for the proposition that

Christopher v. Cavallo, 662 F.2d 1082 (4th Cir. 1982), the federal issue was part of the plaintiff's cause of action because its resolution determined the merits of the plaintiff's state-law claim. In Smith v. Kansas City Title & Trust Co., a shareholder brought suit to prevent the directors of the corporation from investing corporate funds in bonds issued by a federally chartered land bank. The action was brought under the charter of the corporation and Missouri corporation law, under which the directors of the Title & Trust Co. were empowered to invest in government bonds only if they were issued pursuant to a valid law. The shareholder contended that the investment would violate the directors' fiduciary duties, because the federal statute authorizing the issuance of the federal land bank bonds was unconstitutional. The Supreme Court held that federal jurisdiction existed to resolve the dispute. In that case, it was clear that the federal issue was part of the plaintiff's casue of action, and not a part of a defense or a response to or anticipation of a defense. In order to make out his claim that the directors' proposed investment would violate their duty under Missouri law to invest only in valid government bonds, the plaintiff was obligated to show that the bonds were invalid; to show that the bonds were invalid, he was obliged to show that their authorizing statute was unconstitutional. Thus, the federal issue, though "remote," was clearly part of the plaintiff's case.

A closely analogous situation arose in the Fourth Circuit's decision in
(Continued)

federal jurisdiction exists over cases

Christopher v. Cavallo, 662 F.2d 1082 (4th Cir. 1982). There, a theatrical producer sued the author of a play under their contract for breach of her warranty that her play did not infringe any copyrights belonging to third parties. The producer argued that the play did in fact infringe a particular copyright. To make out his state-law claim of breach of contract, the producer was obliged to show that the play's author had violated the federal copyright laws. The federal issue was secondary, but it was clear part of the plaintiff's cause of action, not part of a defense or a response to a defense, and the Fourth Circuit properly held tht there was federal jurisdiction.

Thus, neither Smith nor Christopher purports to abandon the requirement that the federal issue must be part of the plaintiff's cause of action, and not a response, regular or anticipatory, to a defense, in order to support federal jurisdiction. They simply stand for the proposition that federal jurisdiction exists where the merits of a state-law cause of action turn on a disputed question of federal law. Smith and Christopher would be apposite to the present case if Garvin had to make out a point of federal law in order to prove that Alumax had been negligent or was strictly liable under state law in tort. That is not the situation here, though. The federal question raised here is quite distinct from the merits of Garvin's state-law claim.

T.B. Harms Co. v. Eliscu, 339 F.2d 823 (2d Cir. 1964), cert. denied, 381 U.S. 915 (1965), involved a different kind of (Continued)

raising such secondary or remote federal questions if resolution of the dispute requires an interpretation of federal law. Nevertheless, it remains true that the federal question must be part of the plaintiff's cause of action. The majority's argument therefore simply misses the mark.

Federal jurisdiction, especially given the absence of diversity, can only exist in the instant case if Garvin's cause of action can be made to arise under federal law. Garvin's cause of action can arise under federal law only if a federal

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"remoteness" problem--the undisputed issue. There, an action was brought pursuant to state contract and property law to determine the ownership of a federally-registered copyright. The Second Circuit held that there was no federal jurisdiction because the underlying federal issue--the validity of the copyright--was undisputed, and no interpretation of federal law was required. The decision did not turn on an application of the well-pleaded complaint rule, because the issue was clearly part of the plaintiff's cause of action. In order to establish its claim to the copyright, the plaintiff had to
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statute provides a cause of action. However, the only federal statute here, the Longshoremen's and Harbor Workers' Compensation Act, does not create any right of action against third parties.[15]

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plead--and would have had to prove, had the allegation been denied--that the copyright was valid. The validity of the copyright was not part of a defense or of a response to a defense. Harms simply stands for the principle that a federal issue, even one that is properly part of the plaintiff's case, will not support jurisdiction if it is undisputed. The decision is therefore inapposite to the present case.

15. Although the argument is equally forclosed by the lack of jurisdiction, Garvin may argue that he does not rely on the LHWCA to create a cause of action. His argument may run that South Carolina common law permitting the tort claims here asserted has existed undisturbed all alnong and that all he seeks to derive from the LHWCA, which clearly is entitled to supremacy over South Carolina law in case of conflict, See U.S. Const. Art. VI, is that the federal act has preempted South Carolina from enacting statutory workers compensation provisions purporting to eradicate for statutory employers (non-employers under the LHWCA) the extant South Carolina common law general
(Continued)

There is no section of the LHWCA which on its face clearly provides employees with a cause of action against

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remedies to which § 933 has pointed. However, if that argument is to be made, it should be advanced in state court, not before us.

Moreover, seductive though such an argument may be on the surface, it, on analysis, exalts from over substance. Statutes, of course, form as much the basic law of a state as to common law decisions. It seems clear that Congress meant to leave scope for the states to fashion and to limit rights of recovery in the area of worker-sustained injuries so long as the rights provided by the LHWCA are not interfered with. As I shall adduce, the congressional purpose was not, by a negative inference, to convert a statement that the LHWCA was not to take away other state developed rights into an establishment of positive law at war with state limitations on such other rights, a creation in the form of a second birth, if you will, assuming that any right in South Carolina for a worker to sue a statutory employer of the likes of Alumax has died with the enactment of S.C. Code Ann. § 42-1-540 (1976). For other reasons later alluded to, I am of the opinion that we, as a federal court, should not undertake an examination of whether, under state law, that death has occurred. At this juncture, however, we merely should determined whether <u>if</u> a death under state law has taken place, any basis for resurrection under federal law exists. For the reasons just stated, I think not.

third parties whose fault causes an injury. Only two sections, section 933(a) and section 905(b), could conceivably be interpreted as providing such a cause of action, but an inquiry reveals that Congress did not intend them to do so.

Looking first to section 933(a),[16] the language of the section indicates that employees are to retain their existing rights of action against third parties who are at fault. There is no indication that Congress intended to provide a new right of action against such persons. The liability of such persons is presumably to

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16. Section 933 provides:

> (a) Election of remedies
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> If on account of a disability or death for which the compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

be determined according to otherwise existing law.[17]

A review of the legislative history of section 933(a) leads to the same interpretation. Section 933(a) was amended to substantially its current form in 1959. Prior to 1959, an injured employee was required to make an election of remedies. If he accepted compensation benefits under the LHWCA, he forfeited his right to sue any third-party tortfeasor whose fault might have caused the accident. In 1959, Congress intended to eliminate that restriction and to allow employees to sue third parties even if they chose to receive compensation benefits. There is no indication in the legislative history of the amendments that Congress intended to provide a new, federal cause of action against third

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17. This "background" law is state tort law if the injury occurson a dock or a pier. It is general maritime law if the injury occurs on navigable waters.

parties. See S. Rep. No. 428, 86th Cong., 1st Sess. reprinted in 1959 U.S. Code Cong. & Ad. News 2134-36. If anything, the Senate Report suggests that Congress merely intended to allow employees to pursue state law remedies, becuase it explains that "[t]he principle underlying the modification of the law made by this bill, is embodied in most modern state workmen's compensation laws." Id. at 2135. State workmen's compensation laws do not provide new causes of action; they allow employees to sue third parties under state tort law.

The conclusion that section 933(a) provides no federal right of action is also supported by the fact that most courts which have examined the LHWCA in an attempt to find such a right of action have not even considered section 933. See Holland v. Sea-Land Service, Inc., 655 F.2d 556 (4th Cir. 1981) (concluding that there is no federal cause of action against third parties under the LHWCA);

Russell v. Atlantic & Gulf Stevedores, 625 F.2d 71 (5th Cir. 1980) (same).

The only other section of the LHWCA that could arguably provide a right of action is section 905(b).[18] But it seems clear that section 905(b) does not provide a cause of action for Garvin. Looking first to the language of the section, it is plain that section 905(b) is concerned only with actions brought against vessels. It has no application to actions brought against land-based third parties. Moreover, the language suggests that, even

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18. Section 905(b) provides in relevant part:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void.

against vessels, the section provides no new cause of action. Instead, it provides that an employee may bring an action "in accordance with the provision of section 933." All that section 905(b) does, then, is to make clear that an employee may bring an action against a vessel under the general maritime law.

The legislative history supports this reading of section 905(b). It is clear from the House Report that the Committee on Education and Labor was concerned solely with injuries occurring aboard vessels. H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Ad. News 4698, 4701-05. The report also explains that the Committee intended that third-party actions against vessels should be governed by general principles of negligence, id. at 4702, 4703, 4704, but not by the negligence laws of the various states. Instead, federal courts should apply the general federal maritime negligence law, through the

exercise of their admiralty jurisdiction. Id. at 4705. Thus, the legislative history indicates that Congress did not intend section 905(b) to create a new cause of action against parties other than vessels, and suggests that Congress did not intend to create a new cause of action at all.

This view is further supported by the case law. The Fourth Circuit has not directly confronted the issue, but our holding in Holland v. Sea-Land Service, Inc., 655 F.2d 556 (4th Cir. 1981) provides implicit support for the conclusion that section 905(b) does not provide a right of action against third parties other than vessels. In Holland, the court considered a situation similar to the one here: a third-party action brought by an employee injured on land against the operator of a port facility. The opinion explains why there was no admiralty jurisdiction, and does not expressly discuss whether there could be

federal question jurisdiction. But the court's conclusion was that the employee had no federal cause of action, and that his claim arose solely under Virginia law.[19] Its holding necessarily implies that the LHWCA does not create any federal right of action, at least against parties other than vessels, and, therefore, that the LHWCA does not give rise to federal question jurisdiction in such circumstances. The Fifth Circuit has squarely held that section 905(b) creates no new right of action that could serve as a basis for federal question jurisdiction in any circumstances. Chirstoff v. Bergeron Industries, Inc., 748 F.2d 297, 298 (5th Cir. 1984); Russell v. Atlantic & Gulf Stevedores, Inc., 625 F.2d 71, 72 (5th Cir. 1980); Parker v. South Louisiana Contractors, Inc., 537 F.2d 113, 118 (5th

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19. Jurisdiction was retained on the basis of diversity. Holland, supra, 655 F.2d at 557.

Cir 1976), cert. denied, 430 U.S. 906 (1977).[20] Consequently, the LHWCA does not provide Garvin with a statutory cause of action against Alumax in the context presented here.

If the LHWCA does not create a federal right of action, the only other possible way to argue that Garvin's claim "arises under" federal law is to contend that section 933 of the LHWCA incorporates state law, thereby turning the state law cause of action into a federal one. However, that approach also fails. First, section 933 does not say anything about incorproating state law; it only reassures employees that they retain their rights under state law and that they need not make an election of remedies. Second, even if section 933 does incorporate state

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20. But see Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156 (1981) (assuming, without deciding, that § 905(b) creates a statutory cause of action against vessels).

law, there would still be no federal question jurisdiction. It has long been settled that there is no federal question jurisdiction where federal law incorporates state law as the rule of decision. Shoshone Mining Co. v. Rutter, 177 U.S. 505 (1900).

I therefore conclude that we have no jurisdiction to decide the present case, and that it should be dismissed for lack of jurisdiction.

III.

Because of dismissal for lack of federal jurisdiction would not, in my mind, resolve the dispute between the parties, the party should be free to seek a resolution in the state courts of South Carolina.[21] Over and beyond our lack of

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21. For reasons adduced in note 11, ante, I conclude that Garvin's "concession" that there is no state cause of action does not really exist, at least not in such a way as to bind him, foreclosing his initiation of an action in a South Carolina court. Even if it did, that would not somehow serve to confer the jurisdiction we lack, (Continued)

jurisdiction, in my view, it would be preferable to allow the South Carolina courts to decide the merits of the present case, because that decision involves, purely and simply, an interpretation of South Carolina law. It is not appropriate to assume that indubitably South Carolina would apply the worker's compensation bar in favor of Alumax as a general contractor.

The success or failure of Alumax's immunity defense depends on the resolution of two issues. First, there is the question whether the immunity provisions of the South Carolina workers' compensation act apply, as a matter of state law, where the injured worker has elected not to receive benefits under the

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even for the limited purpose of foreclosing any state court proceeding which Garvin might elect to bring against Alumax. The existence vel non of a state cause of action, in my view, is totally irrelevant to the issue of whether we have any jurisdiction to rule on Garvin's claim.

South Carolina act. Second, if the South Carolina immunity provisions apply, there is the question whether those provisions are invalid under the Supremacy Clause when applied in the present context, due to a conflict with federal law. The majority opinion addresses only the second issue, and does not discuss the first. Yet its determination that Alumax is entitled to judgment involves an implicit holding that the South Carolina statute grants immunity to Alumax despite Garvin's election of federal benefits. I do not believe that the answer to the state-law issue is so obvious and indisputable, and I would allow the parties to seek an interpretation of the South Carolina statute in the South Carolina courts.[22]

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22. In a similar situation, the Fifth Circuit appears to have interpreted the Louisiana workers' compensation statute to deny immunity to a general contractor where the injured employee opts for the LHWCA. Jenkins v. McDermott, Inc., 734 F.2d 229, 233-34 (5th Cir. 1984), vacated, 742 F.2d 191 (5th Cir. 1984):
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Under the South Carolina workers' compensation statute, the employers who

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Likewise, TAD, the plaintiff's employer (and an appellee third party defendant), suggests affirmance of the summary judgment as a matter of law on another ground. TAD argues that, since this land injury to a land-based harbor employee is subject to concurrent coverage of both federal longshoremen's and state compensation acts, Sun Ship, Inc., v. Pennsylvania, 447 U.S. 715, 100 S.Ct. 2432, 65 L.Ed.2d 458 (29980), concurrently applicable should be both the federal longshoremen's compensation remedy and also the state compensation-law bar to tort suits against third parties in a principal-contractor relationship with the plaintiff's employer.

Issues sometimes do arise as to whether an injured workman has elected to pursue his federal compensation remedy or his state remedy, or instead as to whether his election of one necessarily excludes receiving not-inconsistent supplementary benefits from the other that do not amount to double recovery. See 4 Larson, Workmen's Compensation Law, §§ 89.50-89.74 (1984). In the present instance, however, the factual showing does not exclude that Jenkins has elected or will finally elect the federal remedy and not seek supplementary state compensation benefits, if indeed there are any not inconsistent with the federal remedy.

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are liable to pay workers' compensation benefits receive immunity from tort suits.

> In the present case, the state defense founded upon the state compensation act's coverage scheme, whereby in statutory exchange for his state compensation remedy an injured workman accepts it as the exclusive remedy against his employer and his employer's principal (as "statutory employer"), cannot survive a rejection of the state act's coverage and the election, instead, of the federal remedy .... As we indicated in a somewhat similar context, "the legislatively intended uniformity of treatment of maritime and amphibious workers, regardless of situs", would be thwarted if "differing remedies would be provided to workmen injured in the performance of the identical" mineral-production employment, depending upon where the injury was sustained.

The vacation in Jenkins resulted from the Supreme Corut's issuance of June 26, 1984, of its decision in Wahsington Metropolitan Area Transit Authority v. Johnson, 467 U.S. 925 (1984). However, the grounds for vacation were largely dissipated by the legislative overruling of WMATA which occurred in September, 1984. See 33 U.S.C. § 904(a), as amended by P.L. 98-426, 98 Stat. 1639 (1984).

While I do not cite the Jenkins case to suggest as unequivocal answer to the question of whether Garvin has a state cause of action where he has opted for LHWCA benefits and thereby waived state workers' compensation benefits,
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S.C. Code Ann. § 42-1-540.[23] The statute also provides that general contractors are liable for workers' compensation benefits payable to employees of their subcontractors. S.C. Code Ann. § 42-1-400.[24] The South Carolina Supreme

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nevertheless it is authority for the proposition that the question is by no means an open and shut one. The legislature of South Carolina might, for uniformity reasons of the kind to which the Jenkins court alluded, hold the election to proceed under LHWCA a basis for rendering inapplicable the state law bar to a suit against a statutory employer such as Alumax.

23. Section 42-1-540 provides as follows:

> The rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of such injury, loss of service or death.

(Emphasis supplied).

24. Section 42-1-400 provides:
(Continued)

Court has held that the immunity created by the statute extends to general contractors. Parker v. Williams & Madjanik, Inc., 275 S.C. 65, 267 S.E.2d 524 (1980); Bridges v. Wyandotte Worsted Co., 243 S.C. 1, 132 S.E.2d 18 (1963). The general contractor is protected even where it is the subcontractor that actually pays the South Carolina worker's compensation benefits to the injured employee. Parker, 275 S.C. at 74, 267 S.E.2d at 528. Finally, the statute provides that every employee is presumed to have agreed to accept compensation

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> When any person, in this section ... referred to as "owner," undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section ... referred to as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him.

under the terms of the statute for any personal injury arising out of his employment, unless he gives notice to the contrary prior to any accident. S.C. Code Ann. § 42-1-310.[25]

The question whether the South Carolina statute's immunity provision applies to protect Alumax here requires an interpretation of the statute. One view would be that the immunity provision bars any tort suit regardless of the injured employee's choice subsequent to the accident to accept benefits under the LHWCA to the exclusion of the South

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25. Section 42-1-310 provides that:

> Every employer and employee, except as stated in this chapter, shall be presumed to have accepted the provisions of this title respectively to pay and accept compensation for personal injury or death by accident arising out of and in the course of the employment and shall be bound thereby, unless he shall have given, prior to any accident resulting in injury or death, notice to the contrary in the manner provided in § 42-1-340.

Carolina act's benefits. The other view would be that the statute creates a scheme that must be viewed as a whole. If the employee decides to opt out of the state scheme by receiving benefits under a different plan, he should not, the argument may run, be barred by immunity provisions that are a part of the state scheme, especially since those provisions are stated only on a presumption basis and and the worker has manifestly not accepted compensation under the South Carolina act.[26]

The South Carolina courts have not yet addressed the question of the

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26. If the state statute creating a false presumption that a worker has accepted the state law benefits when, indisputably, he has done just the reverse by opting for LHWCA benefits, is nevertheless binding on the worker, it may be constitutionally suspect. In a series of cases, the Supreme Court has held that the use of irrebuttable presumptions may violate due process. E.g., United States Dept. of Agriculture v. Murry, 413 U.S. 508, 514 (1973); Vandis v. Kline, 412 U.S. 441, 452-54 (1974); Stanley v. Illinois, 405 U.S. 645, 656-58 (1972).

application of the workers' compensation law when the injured employee turns instead to the federal LHWCA. In Parker v. Williams & Madjanik, Inc., 275 S.C. 65, 267 S.E.2d 524 (1980), the South Carolina Supreme Court held that, where the injured worker receives compensation under the South Carolina act, the general contractor is immune from suit even though the benefits are actually paid by the subcontractor. However, that case did not involve the situation where the employee chooses to receive benefits under a federal workers' compensation program rather than the state program.

An argument that the general contractor should not receive immunity from suit where the employee has elected to receive benefits under a federal program would begin with the premise that the language of the statute cannot mean exactly what it says. Section 42-1-540 says that "[t]he rights and remedies granted by this title to an employee when

he and his employer have accepted the provisions of this title ... shall exclude all other rights and remedies of such employee ...." Yet, as a flat statement, that language is inescapably false. In fact, in certain circumstances, such as the ones presently before us, an employee can elect to obtain compensation benefits under the LHWCA despite the statutory attempt to bar all remedies except those made avilable by the South Carolina statute. In those circumstances, the rights and remedies granted by the South Carolina act simply are not exclusive; the injured employee may avail himself of a different remedy.

The conflict here between the language of the statute and the reality that an employee may elect LHWCA benefits can be explained in one of three ways. It may be that the artificial presumption is not applied to the LHWCA-eligible employee, who is thus not deemed to accept the provisions of the South Carolina

statute prior to injury. Alternatively, even if the employee is deemed to have accepted those provisions, it may be that there are no "rights and remedies granted by this title" when the employee has chosen instead to receive compensation under the LHWCA. Finally, the answer may be simply that the South Carolina compensation remedy is not the exclusive remedy available to the employee when injury occurs. I do not decide those questions. I merely point to them as reasons why there are substantial issues to be addressed properly by the courts of the State of South Carolina, rather than by a federal court palpably without jurisdiction. Regardless of which explanation is correct, it is clear that, under South Carolina law, the LHWCA-eligible employee is not limited exclusively to the state compensation remedy.

Once it is clear that the South Carolina compensation remedy is not

exclusive for LHWCA-eligible employees, the question is which alternative remedies are allowed. It is possible that, in circumstances where the employee is eligible for benefits under the LHWCA, the statute could be construed to permit not only the remedy of LHWCA compensation benefits but also a tort remedy.

On the other hand, a construction of the statute that would grant immunity to a general contractor even where the employee chooses to receive federal benefits derives some support from Home Indemnity Co. v. Poladian, 270 F.2d 156 (4th Cir. 1959). In that case, the Fourth Circuit held that a Virginia general contractor was entitled to immunity from tort suits under the Virginia workmen's compensation act even though the injured employee had elected to receive compensation benefits under the District of Columbia workmen's compensation law.[27] The provisions of the

Virginia statute considered there were substantially identical to those of the South Carolina statute involved here. 270 F.2d at 157 n.3. However, it is by no means clear whether the court treated the matter as one of interpretation of the Virginia statute or as one of choice of law. The employee argued that Virginia tort law should not control his negligence action where he elected to receive benefits under the District of Columbia worker's compensation law. The court held that Virginia law applied as a matter of choice of law, and then assumed, without analysis, that the Virginia statute granted immunity to the general contractor. A South Carolina court would certainly be free to interpret South Carolina's statute to reach an opposite result.

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27. The employee, a resident of the District of Columbia, apparently was entitled to choose between the two compensation programs.

Policy considerations appear to cut both ways. On the one hand, a general contractor usually pays the cost of securing workers' compensation benefits for the subcontractor's employees as part of its overall contract with the subcontractor. If the general contractor may also be sued in tort, it must bear a double burden of potential liability.[28] On the other hand, a construction of the South Carolina statute allowing an injured employee who chooses to receive federal benefits to sue a general contractor would tend to equalize the overall packages of remedies available to workers injured on land and at sea. Under the federal maritime law, injured employees entitled

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28. A factor about which we have not been informed, but which might play a determinative role, is whether the opting out of the South Carolina statutory scheme by Garvin prior to the injury (in which case he incontestably would be allowed to proceed on his tort claim action) would have effected any significant premium saving to Alumax.

to worker's compensation benefits may also recover damages against general contractors for negligence or unseaworthiness. See, e.g., Pallas Shipping Agency, Ltd., v. Duris, 461 U.S. 529 (1983); Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979). It is arguable that, in the interest of equality of treatment, the South Carolina courts would allow a similar avenue of recovery to a maritime worker injured within the landward portion of the geographical area to which the LHWCA extends.

IV.

In the present case, the court decides the merits of a matter over which we have no jurisdiction, and denies the parties an opportunity to seek an interpretation of a South Carolina statute in the South Carolina courts. I must therefore, respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

JAMES EDWARD GARVIN, JR., Plaintiff, vs. ALUMAX OF SOUTH CAROLINA, INC., A Delaware Corporation, ALESA ALUSUISSE ENGINEERING, A.G., A Swiss Corporation, REGGIANE, An Italian Corporation and SPECIMAS, An Italian Corporation, Defendants.	Civil Action No. 82-1903-1
BARBARA J. GARVIN, Plaintiff, vs. ALUMAX OF SOUTH CAROLINA, INC., A Delaware Corporation, ALESA ALUSUISSE ENGINEERING, A.G., A Swiss Corporation, REGGIANE, An Italian Corporation and SPECIMAS, An Italian Corporation, Defendants.	Civil Action No. 82-1902-1

ORDER

These actions were commenced on July 27, 1982. Plaintiff James Edward Garvin (C/A #82-1903-1) seeks damages for personal injury, including the loss of both arms, sustained while servicing a "ship unloader" for defendant Alumax of South Carolina, Inc., a Delaware corporation ("Alumax"), owner of the unloader, being operated by said plaintiff's employer, Lemm Corporation ("Lemm"), pursuant to a written agreement. Plaintiff Barbara J. Garvin (C/A #82-1902-1), wife of James Edward Garvin, seeks damages for loss of consortium. Inasmuch as any initial recovery would be based on the merits of plaintiff James Edward Garvin's case, this order will address those motions filed in his case but will be applicable to the duplicate motions filed in the loss of consortium action.

On September 21, 1982, the defendant Alumax filed its motion to dismiss the

complaint which was based on the doctrine of strict liability in tort. On January 3, 1983, plaintiff filed his amended complaint which included additional actions based on negligence and recklessness. Two subsequent motions to dismiss were filed by defendant Alumax on January 24, 1983, and April 18, 1983, on the grounds of (1) lack of jurisdiction and failure to state a claim and (2) lack of subject matter jurisdiction and diversity jurisdiction, respectively. Thereafter, on April 27, 1983, the court heard oral arguments on the motions but held its rulings in abeyance upon the granting of plaintiff's motion to file a second amended complaint. The second amended complaint ("complaint") was filed on May 3, 1983; and, on May 23, 1983, as a result of the filing of the second amended complaint, Alumax filed a motion to dismiss for the purpose of renewing its previous motions to dismiss. This matter is now before the court on those motions

to dismiss renewed by Alumax's motion of May 23, 1983.

Lemm, as plaintiff's employer, provided workmen's compensation insurance for plaintiff who is presently drawing benefits under the Longshoremen's and Harbor Worker's Compensation Act ("LHWCA"), 33 U.S.C. §§ 901 et seq. This action is brought pursuant to the third-party provisions of the LHWCA, including 33 U.S.C. § 933(a), which allow for the institution of an action at law for damages while at the same time receiving compensation benefits.

Before addressing the issues raised by the motions, it is helpful to note the following facts not in dispute:

1. Alumax and others engaged Lemm to operate and maintain a port facility on the Cooper River utilized by Alumax to discharge smelting grade alumina used in the manufacture of aluminum.

2. Lemm utilized its own employees in performing its services for Alumax and

provided insurance coverage for them pursuant to the LHWCA.

3. Plaintiff was injured while servicing a ship unloader owned and supplied by Alumax for Lemm to operate.

4. As a result of the plaintiff's injury, he is drawing compensation benefits provided by Lemm pursuant to LHWCA.

5. Alumax neither paid the plaintiff for his services nor is it providing compensation benefits to him.

Alumax has not answered plaintiff's complaint and general discovery has been suspended pending dispositions of the dismissal motions. It contends that it is either bailor or lessor of the ship unloader. Since discovery may establish that Alumax is in fact a seller of the ship unloader, although not denominated as such, [1] the court is of the opinion that

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1. See Mid-Continent Refrigerator Co. v. Way, 263 S.C. 101, 208 S.E. 2d 31 (1974), (Continued)

it is premature to make a determination of whether strict tort liability applies to a lessor or bailor in the present circumstance. Therefore, Alumax's motion to dismiss the first cause of action of the complaint is held in abeyance pending completion of discovery.

Alumax bases its motions to dismiss this action pursuant to Rules 12(b)(1) and 12(b)(6), Federal Rules of Civil Procedure, on two grounds: (1) that it is a statutory employer of plaintiff and, therefore, is entitled to immunity from suit, and (2) that no basis of subject matter jurisdiction exists which confers power on this court to resolve the liability issues against it.[2]

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for discussion of when a lease will be construed as a sale for Uniform Commercial Code purposes.

2. There is no diversity jurisdiction inasmuch as the plaintiff and Alumax share a common state of citizenry. Additionally, there is no admiralty jurisdiction in that at the time of the (Continued)

For the reasons hereinafter stated, those motions are denied.

AS TO THE STATUTORY EMPLOYER GROUND

Alumax insists that it is immune to suit by virtue of its status as an "employer" of plaintiff under the South Carolina Workmen's Compensation Act, S.C. Code Ann. § 45-1-10 et. seq. ("SCWCA").[3] The court disagrees. Sections 904, 905 and 933 of the LHWCA provide an express statutory scheme for third-party actions against one in the position of Alumax.

Section 904(a) provides:

> (a) Every employer shall be liable for and shall secure the payment to

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accident the plaintiff was not injured on the navigable waters but on a pier, an area adjoining navigable waters, Victory Carriers, Inc. v. Law, 404 U.S. 202, 92 S.Ct. 418 (1971), and no ship was alongside which caused the injury, circumstances which would have established admiralty jurisdiction under the Extensions of Admiralty Act, 46 U.S. C. § 740.

3. S.C. Code Ann. § 42-1-400, grants an immunity against suit to one in the position of Alumax. Alumax argues that this provision provides a defense to Alumax under the State's general tort law in the circumstances.

his employees of the compensation payable under Sections 7, 8, and 9 [33 U.S.C. §§ 907-09]. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment. (sic) (Emphasis added.)

One in the position of Alumax, therefore, is not required to pay or be responsible for payment of compensation to a worker in the position of plaintiff (an employee of a subcontractor which has secured payment of compensation for claimant).

Section 905(a) provides in part as follows:

(a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee...

See also Section 933(i).

Section 933(a) provides:

> (a) If on account of a disability or death for which compensation is payable under this Chapter, the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person. (Emphasis added.)

Section 933(a) and (i) allows suit against the third party while receiving benefits without the necessity of an election. The Act establishes a system to provide an injured employee with immediate medical and compensation benefits without forfeiting his right to pursue any third party liable for his injuries. See generally 1959 U.S. Code Cong. & Ad. News 2134.

As applied to this controversy, the following results from application of the above-referenced sections of the LHWCA: Alumax was not responsible for compensation payments to plaintiff because of Section 904. Since Alumax was not liable for compensation payments, it is

not entitled to the exclusive remedy protection of Section 905(a); Alumax, therefore, is amenable to suit under Section 933(a) and (i).

This conclusion has been uniformly adopted by the reported decisions. The United States Congress intended the availability of such actions although it is at odds with the view taken by the legislatures and courts of some individual states which clothe the general contractor with immunity in similar circumstances. In holding that the general contractor is afforded no immunity and is subject to a third-party action under the LHWCA, The Fifth Circuit has noted:

> Ours is solely a task of statutory construction. But that is a beguiling oversimplification. For from statutory language which in two groups is substantially similar, there are no less than four choices made by the State Courts who find, or claim to find, some policy factor now giving, now denying, literal application to literal terms. Starting, and for that matter ending, with the statute as we must, there is no doubt at all about the right of the injured employee to bring the

> suit [against the general contractor]. The Act expressly accords this right and prescribes elaborate machinery for settlement, apportionment of recovery, and the like....[4]

Probst v. Southern Stevedoring Company, Inc., 379 F.2d 763, 764-65 (5th Cir. 1967). (Footnote omitted; emphasis added.)

Similarly, the Maryland District Court concluded:

> Herein, Rukert [Defendant seeking immunity] at best is the general contractor of the subcontractor which employed plaintiff, and, accordingly, like any other third person, has not been endowed with immunity under sections 904, 905, and/or 933-either as a Defendant in an action by the Longshoremen or as a cross-defendant against cross-claims by the ship.[5,6]

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4. Of course, there are elaborate mechanisms for bringing the third-party action in terms of by whom it may be brought, when the action is assigned to one other than the claimant, etc., all of which may be at odds with various state compensation schemes.

5. Accord, Thomas v. George Hyman Construction Co., 173 F.Supp. 381 (D.D.C. 1959); De Vincenzi v. Waterman Steamship Corp., 156 F.Supp. 481 (N.D. Cal. 1957); Liberty Mutual Ins. Co. v. Goode Construction Co., 97 F.Supp. 316 (E.D. Va. 1951); Fiore v. Royal Painting Co., 398 So.2d 863 (Fla. 1981); Perry v. Baltimore Contractors, Inc., 202 So.2d 694 (La. Ct.
(Continued)

Kozoidek v. Gearbulk, Ltd., 471 F.Supp. 401, 404 (D. Md. 1979).

Alumax urges that the state law applies, and the law of South Carolina, as pronounced in Parker v. Williams & Madjanik, Inc., 275 S.C. 65, 267 S.E.2d 524 (1980), clothes Alumax with immunity to this action.

The issue before the court, therefore, is where the state law grants an immunity to one in Alumax's position and the federal law does not, can the state law be invoked so as to override the federal law. Obviously, it cannot.

It is true that this circuit has held that the situs and status test adopted in 1972, which moved the reach of the LHWCA

App. 1967); Dinacola v. George Hyman Construction Co., 407 A.2d 670 (D.C. 1979).

6. Alumax apparently concedes that the rule of non-immunity to the general contractor obtains where the third-party action is based on traditional maritime tort principals, but only in those circumstances.

landward, was not intended to extend coextensively the traditional maritime tort jurisdiction. See Holland v. Sea-Land Service, Inc., 655 F.2d 556 (4th Cir. 1981), cert. denied, 455 U.S. 919 (1982). However, to adopt Alumax's position that immunity extends to general contractors only in a maritime context would belie the efforts of the United States Supreme Court and Congress to afford maritime workers a liberal, uniform compensation scheme. If Alumax's position is adopted, the plaintiff will be denied a third-party action against Alumax while a co-employee who operates the ship unloader while a vessel is alongside and is injured by the vessel in doing so would be afforded that remedy because the situs of the injury would allow him to bring his third- party action in admiralty. This inconsistent result would obtain even though both workers are covered by the LHWCA.

The history of maritime compensation

establishes that Congress and the Supreme Court have abstained from an interpretation of the LHWCA which would result in disparate treatment of harbor workers and declared that such workers should be allowed the option of pursuing the most liberal remedy available.

Southern Pacific Co. v. Jensen, 244 U.S. 205, 37 S.Ct. 524 (1917), precluded application of state compensation laws to maritime workers on grounds of fundamental federalism. (Article 3, Section 2, of The United States Constitution established maritime law as federal in origin; state compensation law, it was held, unlawfully intruded upon that area.) At the time there was no federal compensation law for harbor workers.

To mitigate the effect of lack of compensation laws available to maritime workers, the Court, in Millers' Indemnity Underwriters v. Braud, 270 U.S. 59, 46 S.Ct. 194 (1926), allowed state compensation to be collected (since no

federal compensation law existed) where involved were "local matters regulation of which would work no material prejudice to the general maritime law...." 270 U.S. at 64, 46 S.Ct. at 195. Hence the "maritime but local" doctrine allowing application of state workmen's compensation laws to harbor workers was born.[7]

In order to eliminate the hardships created by the lack of a federal compensation scheme for harbor workers, the Congress in 1927 passed the LHWCA. Problems were compounded, however, by the fact that the 1927 Act provided that the LHWCA applied only if compensation could not be validly provided by state law. In attempting to solve this problem, the Supreme court in Calbeck v. Travelers Insurance Co., 370 U.S. 114, 82 S.Ct. 1196 (1962), held that injuries to maritime

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7. The "maritime but local" doctrine was originally espoused in a non-compensation context in Western Fuel Co. v. Garcia, 257 U.S. 233, 42 S.Ct. 89 (1921).

workers on navigable waters were compensable under the LHWCA even though the injury was also constitutionally compensable under a state compensation act.

The court in Calbeck assured harbor workers injured on the navigable waters that they possessed the federal compensation remedy enacted by Congress regardless of the availability of state remedies. This remedy, however, was limited only to those longshoremen or harbor workers injured in or on the navigable waters, and those injured on land or a pier were limited to state compensation remedies. This was the holding of Nacirema Operating Co., Inc. v. Johnson, 396 U.S. 212, 90 S.Cot. 347 (1969). This circumstance allowed for a disparity of treatment among harbor workers based solely on a fortuity, viz., whether they were injured on the navigable waters (allowing for the usually more liberal LHWCA benefits) or on a pier

(allowing state compensation benefits only).

As a result, the 1972 amendments to the LHWCA were enacted by Congress extending the coverage of the Act landward. The reasons for this extension were stated by the House Education and Labor Committee:

> The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees [sic]
> engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.
>
> The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity.... S.Rep. at 12-13; H.Rep. at 10-11, U.S. Code Cong. & Admin. News, 1972, p. 4708. (Emphasis added.)

From the beginning, therefore, the Supreme Court stumbled through numerous cases in an effort to find fair compensation for the insured harbor worker, but it was limited in helping injured harbor workers by notions of fundamental federalism and statutory prohibition. Congress came to the aid of all harbor workers in 1972 by expanding its coverage landward, detailing its reasoning for the amendments and making possible the Supreme Court's development of a model for interplay between the LHWCA and state compensation schemes also applicable by virtue of Calbeck, 370 U.S. 114, 82 S.Ct. 1196 (1962). As a result, the Court in Sun Ship, Inc. v. Pennsylvania, 447 U.S. 715, 100 S.Ct. 2432 (1980), held that a state may apply its workmen's compensation scheme to land-based injuries that fall within the coverage of the LHWCA after the 1972 amendments. In discussing the purpose of the amendments and the interplay between

the LHWCA and state workmen's compensation schemes, the Court noted:

> As the Reports make clear, the disparities which Congress had in view in amending the LHWCA lay primarily in the paucity of relief under state compensation laws. The thrust of the amendments was to "upgrade the benefits". S.Rep.No.92-1125, supra, at 1; see Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 261-262, 97 S.Ct. 2348, 2356, 53 L.Ed.2d 320 (1977). Concurrent jurisdiction for state and federal compensation laws is in no way inconsistent with this policy of raising awards to a federal minimum. When laborers file claims under the LHWCA, they are compensated under federal standards. And workers who commence their actions under state law will generally be able to make up the difference between state and federal benefit levels by seeking relief under the Longshoremen's Act, if the latter applies.
>
> To be sure, if state remedial schemes are more generous than federal law, concurrent jurisdiction could result in more favorable awards for workers' injuries than under an exclusively federal compensation system. But we find no evidence that Congress was concerned about a disparity between adequate federal benefits and superior state benefits...

447 U.S. at 723-24, 100 S.Ct. at 2439-40. (Emphasis added; footnotes omitted.) Since Sun Ship, it has been held that one receiving compensation under a state

compensation scheme, may seek and obtain a supplemental award under the LHWCA allowing for the more liberal award there provided. Landry v. Carlson Mooring Service, 643 F.2d 1080 (5th Cir. 1981).[8]

In summary, Congress has declared that the purpose of the 1972 amendments is to uniformly "upgrade benefits" under the LHWCA. The Supreme Court has held that where one seeks state compensation benefits in a context covered by the LHWCA, he may supplement his compensation by applying for more liberal LHWCA benefits. Thus, the Court has upheld the obvious intent of Congress to afford

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[8]Conversely, where greater rights are allowed by a state compensation scheme, even though the injury is within the scope of the LHWCA, a more liberal state compensation remedy may be obtained consistent with Sun Ship. American Original Foods, Inc. v. Ford, 221 Va. 557, 272 S.E.2d 187 (1980).

harbor workers the most liberal benefits without reference to the "fortuitous circumstances" of the exact situs of the injury. The right granted by Sections 904, 905(a), and 933 of the LHWCA, which allows suit to be brought against the general contractor in circumstances applicable here, represents a substantial right given to those covered by the Act, and such right has been uniformly recognized by the case law. The Supreme Court granted a claimant the benefit of the more liberal provisions of the LHWCA even where a state compensation scheme is also applicable. Sun Ship Inc. v. Pennsylvania, 447 U.S. 715, 100 S.Ct. 2432 (1980). Where the LHWCA is properly invoked, its more liberal provisions cannot be supplanted in a piecemeal fashion by inconsistent state law concepts. If this were allowed, "a state policy may produce a result inconsistent with the result of the federal statute," viz., specifically to allow suit against a

general contractor, and generally to provide uniformity of treatment among harbor workers. Rice v. Sante Fe Elevator, 331 U.S. 218, 236, 67 S.Ct. 1146, 1155 (1947). Indeed, this would not be allowed in light of the Supreme Court's indication in Sun Ship that although the LHWCA does not preempt state compensation laws in their entirety, where there is a clear conflict in provisions, the LHWCA controls as a matter of "preemption." Sun Ship, 447 U.S. at 724, 100 S.Ct. at 2438, n.6.

To allow one group of harbor workers that right because their injuries took place on board a vessel or which occurred on a pier caused by a vessel alongside and deny it to another harbor worker injured on a pier without a vessel alongside would deny that worker the more liberal benefits of the Act by the "fortuitous circumstance" that his injury did not occur on navigable waters or was not caused by a vessel alongside the pier.

This would frustrate the intent of Congress to provide a uniform compensation system to harbor workers, give precedence to a restrictive aspect of state compensation law at the expense of the more liberal LHWCA, and run afoul of the clear fact that "the Congress ha[s] clearly, under the Longshoremen's and Harbor Workers' Act, opted for non-immunity for the general contractor sued by an employee of the subcontractor." Kozoidek v. Gearbulk, Ltd., 471 F. Supp. 401, 404, citing Probst v. Southern Stevedoring Company, 379 F.2d 763 (5th Cir. 1967). Based on the above, it is the opinion of this court that defendant Alumax's motion to dismiss on the basis of the statutory immunity defense should be denied.

AS TO THE LACK OF SUBJECT MATTER JURISDICTION GROUND

As above indicated, §904, in conjuction with §905(a) and 933(a)(i), affirmatively grant the right of action

against a general contractor such as Alumax. The United States Congress opted to grant this right in light of a substantial body of state legislative and decisional law in the workmen's compensation area which denies such a suit against the general contractor. As such, a peculiarly federal right has been explicitly created by Congress in favor of a plaintiff against the general contractor and has been so interpreted by the federal and state courts in the longshoremen context. Therefore, in the present circumstances it can be said an enactment of Congress which is in derogation of the law of South Carolina, and a substantial body of workmen's compensation law, creates a right of action against a general contractor, such as Alumax, and the federal decisions have given the plain wording of those statutes the expected effect.

Furthermore, as the court noted in Probst, 379 F.2d at 767, the Congress has

comprehensively and elaborately devised a statutory mechanism for pursuing compensation under the Act and for the third-party actions which rise out of it.

Since the statutes above alluded to and the federal decisions create a right under federal statute which would otherwise not exist, the plaintiff comes within the statement recently made by the Supreme Court that, in order for a federal question to be stated, the plaintiff "will be obligated to establish both the correctness and applicability to his case of a proposition of federal law." Franchise Tax Board v. Construction Laborer Vac. Trust, ____ U.S. ____, 103 S.Ct. 2841, 2846 (1983). Indeed, the only reported decision which discusses the issue of whether or not federal jurisdiction is stated in a non-admiralty third-party action context under the LHWCA holds that federal question jurisdiction exists. City Stores Co. v. Shull, 161 F. Supp. 459 (D.D.C. 1958).

In City Stores the test for determining the existence of a federal question so as to satisfy §1331 jurisdictional requirements was noted to be as follows:

> How and when a case arises "under the constitution or laws of the United States" has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another.

161 F. Supp. at 465. (Citation omitted.) This pronouncement is consistent with Franchise Tax Board. Here, plaintiff, although he is precluded from maintaining this action under state law, is granted the right to do so by federal statute. This right granted plaintiff under federal law, but denied him under state law, is essential to his ability to maintain the action against Alumax.

Alumax urges that the cases of Russell v. Atlantic & Gulf Stevedores, 625 F.2d 71 (5th Cir. 1980), and Heim v. City of New York, 442 F. Supp. 35 (E.D.N.Y. 1977),[9] stand for the proposition that federal question jurisdiction does not exist under the LHWCA. However, the court determines that these cases are not controlling. They were brought under §905(b) of the LHWCA, not §904, 905(a) and 933. §905(b) deals with a specific type of third-party action, an admiralty suit against a vessel. Other third-party suits are controlled by the provisions of §933, 904 and 905(a). The purpose of the passage of §905(b) in 1972 allowing for third-party suit against a vessel, based on negligence only, was "among other

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[9]There, plaintiffs tried to utilize Section 1331 jurisdiction to entitle them to a jury trial not afforded them in admiralty.

things, to eliminate the shipowner's liability to the longshoremen for unseaworthiness and the stevedore's liability to the shipowner for unworkmanlike service resulting in injury to the longshoremen--in other words, to overrule Sieracki and Ryan." Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 257, 262, 99 S.Ct. 2753, 2757 (1979).

Prior to the 1972 amendments, Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S.Ct. 872 (1946), allowed a longshoreman to sue a vessel under the strict liability theory of unseaworthiness. The vessel could then, under Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., 350 U.S. 124, 76 S.Ct. 232 (1956), sue the stevedore and the longshoreman's employer for breach of warranty of workmanlike performance. By this circuitous method, traditional admiralty principles allowed the amount paid by the longshoreman's employer to far exceed the amount for which it was liable under its compensation

obligation. §905(b) was passed in response to this, preventing the longshoreman from suing the vessel for unseaworthiness, which in turn would sue the stevedore for breach of implied warranty. The amendment limited the longshoreman's remedy to one in negligence against the vessel and cut off the vessel's right to indemnity against the stevedore; thus altering by statute a pre-existing principle of admiralty law. Indeed, as the Court noted in Sun Ship:

> [I]t seems that the quid quo to the employers for the landward extension of LHWCA by the 1972 amendments was simply abolition of the longshoremen's unseaworthiness remedy. See S.Rep.No.92-1125, supra at 4-5; H.R.Rep.No.92-1141, supra, at 1, U.S. Code Cong. & Admin. News 1972, at 4698; N.E. Marine Terminal Co. v. Caputo, supra, at 261-262, 97 S.Ct., at 2356. Indeed, it is noteworthy that in their discussion of advantages to employers under the 1972 amendments, the bill Reports dwell upon the rejection of the unseaworthiness action ...

447 U.S. at 724-25, 100 S.Ct. at 2439.

It is clear, therefore, that in passing §905(b), the Congress was

endeavoring to change a long-standing rule of admiralty law in one specific context. It did not deal with other bases of jurisdiction or bases of liability under the LHWCA.

Heim and Russell are not applicable since those cases deal with a §905(b) cause of action, which Congress has recognized as maritime in nature.[10] However, the third-party action, as in City Stores, is a nonadmiralty, third-party claim against a specific

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10. The separate constitutional basis of maritime law affords its litigants different rights and obligation than normally applicable to cases at law. For instance, this separate basis has been recognized by the Fourth Circuit as dictating lesser due process rights to litigants than those who assert actions at law. See Amstar Corporation v. S.S. Alexandros T, 431 F. Supp. 328, aff'd, 664 F.2d 94 (1980). Likewise, the United States Supreme Court in Weyerhaeuser Steamship Co. v. United States, 372 U.S. 597, 83 S.Ct. 926 (1963), recognized the peculiar constitutional basis for and ancient origins of admiralty law in circumventing the rule under the FECA that it comprises the exclusive remedy for federal employees as against the government.

statutorily defined third party, a general contractor, provided for by §904, 905(a), and 933(a)(i). It is an action which would not be allowed if the South Carolina Workmen's Compensation Act exclusively applied because of the general contractor immunity defense; but it is an essential element of plaintiffs' third-party action under the LHWCA.

Based on the above, it is the conclusion of this court that jurisdiction over this action against Alumax is established under 28 U.S.C. § 1331, and defendant Alumax's motions to dismiss on jursidictional grounds should be denied.

It is, therefore,

ORDERED, that defendant Alumax's motion to dismiss the first cause of action in this matter be, and the same is hereby, held in abeyance until completion of discovery. It is

ORDERED FURTHER, that defendant Alumax's remaining motions to dismiss be, and the same are hereby, denied; and the

said defendant shall answer the complaint within thirty (30) days from the date of this order, and all parties shall respond to all pending discovery within a like period. It is

ORDERED FURTHER, that inasmuch as this order involves controlling questions of law to which there are substantial grounds for difference of opinion, and immediate appeal from this order may materially advance the ultimate termination of the litigation, the defendant Alumax is hereby granted the right to seek immediate relief, if it be so advised, in the Court of Appeals for the Fourth Circuit (28 U.S.C. § 1292(b)), and, pending the seeking of such relief, further proceedings in this court are hereby stayed.

AND IT IS SO ORDERED.

/s/
FALCON B. HAWKINS
United States District Judge

Charleston, SC
January 12th, 1986.

A TRUE COPY
Attest: John W. Williams, Clerk

By: /s/ Lisa H. Walpole
Deputy Clerk

FILED
January 12, 1984
John W. Williams, Clerk
Charleston, S.C.

ENTERED
1-12-84

JUDGMENT

United States Court of Appeals
for the
Fourth Circuit

No. 84-1156
C/A 82-1902-1 & 82-1903-1

Barbara J. Garvin,
James Edward Garvin, Jr.,

Appellees,

versus

Alumax of South Carolina, Inc.,
a Delaware Corporation,

Appellant,

and

Alesa Alusuisse Engineering, A.G.,
a Swiss Corporation, Reggiane, an
Italian Corporation and Specimas,
an Italian Corporation,

Defendants.

Appeal from the United States District Court for the District of South Carolina.

This cause came on to be heard on the record from the United States District Court for the District of South Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court

that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed. The case is remanded to the United States District Court, at Charleston, for further instructions consistent with the opinion filed herewith.

/s/ John M. Greacen
Clerk

Original Filed
May 28, 1986
John W. Williams, Clerk
Columbia, S.C.

Filed
April 1, 1986
U.S. Court of Appeals
Fourth Circuit

A True Copy, Teste:
John M. Greacen, Clerk
By /s/ Barbara Rowe
Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 84-1156

Barbara J. Garvin,
James Edward Garvin, Jr.,

Appellees,

versus

Alumax of South Carolina, Inc.,
a Delaware Corporation,

Appellant,

and

Alesa Alusuisse Engineering, A.G.,
a Swiss Corporation, Reggiane, an
Italian Corporation and Specimas,
an Italian Corporation,

Defendants.

ORDER

Upon consideration of the petition for rehearing, and no poll of the court having been made on the suggestion for rehearing en banc, and with the concurrence of Judge Russell and Judge Murnaghan,

IT IS ORDERED that the petition for rehearing be, and it hereby is, denied.

/s/ Clement F. Haynsworth, Jr.
United States Circuit Judge

May , 1986

FILED
May 14, 1986
U.S. Court of Appeals
Fourth Circuit

CERTIFICATE OF MAILING

I hereby certify that I have had a true and correct copy of the above and foregoing Petition for Writ of Certiorari mailed to David B. McCormack, Esquire, and M. Dawes Cooke, Jr., Esquire, being all counsel of record, postage pre-paid, this 11th day of July, 1986.

